Toward a Private Law of Intimates' Obligations

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ABSTRACT: When former cohabitants ask courts to distribute property at the end of a nonmarital relationship, they usually lose—even when the partners were as economically intertwined as spouses. Family law scholars have traditionally criticized these cases in terms of longstanding gendered ideas about family relationships. This Article proposes a complementary account at the intersection of feminist and private law theory: that the law of voluntary obligations is not adequately developed to protect intimates' cooperation. Although marital status law aims to safeguard thick cooperation between spouses and contract law captures a range of more market-based cooperation, for historically contingent reasons, little doctrine has evolved to govern cohabitants' cooperation. As a result, the current law of cohabitants frequently fails to further important purposes of private law writ large, including facilitating joint projects, providing redress for harm, and preventing exploitation.

Scholars and legal decision-makers should develop private law doctrine commensurate with the understanding that less market-based cooperation is both commonplace and deserving of legal protection. This project would improve the resolution of disputes between all intimates: not just unmarried partners, but also other family members, friends, and those in relations of interdependence

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or trust. It also presents opportunities to build a more nuanced and complete private law and private law theory.

INTRODUCTION

Around twenty million U.S. adults are currently living with a partner to whom they're not married.[1] Some of these nonmarital couples become economically interdependent, combining their efforts, pooling their material resources, and forgoing outside opportunities. Yet the law affords them little protection. For judges rarely distribute property between former unmarried

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1. *See* Christopher A. Julian, *A Decade of Change in Shares of Single, Cohabiting, and Married Individuals, 2012-2022* (Nat'l Ctr. for Fam. & Marriage Rsch., Family Profile No. 07, 2023), https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/julian-decade-change-single-cohabiting-married-2012-2022-fp-23-07.pdf [https://perma.cc/DAZ4-H4J5].

partners when their relationships end, even when the partners' conduct during the relationship was identical to that of a married couple.[2]

Feminists and family law scholars have frequently decried the fact that nonmarital partners generally lose the lawsuits they bring requesting property from a former partner. The standard explanation of these "cohabitant cases" goes like this: Because only spouses can access divorce distribution regimes and few states have developed other relationship-based regimes, nonmarital partners must make recourse to generally applicable private law remedies.[3] When they attempt to do so, however, judges routinely reject their contract and unjust-enrichment claims for reasons having to do with entrenched, gender-inflected ideas about family relationships.[4] In particular, courts apply a vision of contract law that distinguishes sharply between family members' exchanges of resources and market-based transactions and understands legal obligations to arise only from latter.[5] Cohabitants lose, on this account, because judges adjudicating their claims see them as intimates interacting, not strangers transacting.

But the cohabitant cases reveal problems that run even deeper and wider than scholars of nonmarital relationships have appreciated. Although the gender-based account explains some cohabitant cases well, others suggest another hypothesis: that judges struggle to adjudicate unmarried partners' disputes for reasons that, though consistent with feminist analyses, implicate fundamental principles of private law. Namely, the law of voluntary obligations has yet to be fully adapted to deal with intimates' cooperation.[6]

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2. *See infra* notes 89–93 and accompanying text. This Article engages specifically with United States law. Some other common-law jurisdictions have taken different approaches to regulating unmarried partners. *See, e.g.*, Erez Aloni, *Compulsory Conjugality*, 53 CONN. L. REV. 55, 70 (2021) (noting that Australia, Israel, Alberta, British Columbia, Manitoba, and Saskatchewan have regimes under which "the state applies the same financial obligations that married couples owe to unmarried couples . . . if the nature of the couple's relationship mimics, to some degree, that of married couples"); Helen Alvaré, *U.S. Cohabitation Law: Still Separate and Unequal*, INST. FOR FAM. STUD. (June 25, 2019), https://ifstudies.org/blog/us-cohabitation-law-still-separate-and-unequal [https://perma.cc/5UJZ-ES36] ("More than a few nations and countries have granted marital-like rights to cohabiting couples—*if* their relationship meets several criteria. These include Australia, New Zealand, Canada, Ireland, the Scandinavian countries, and Scotland.").

3. *See infra* notes 86–88 and accompanying text.

4. *See infra* notes 89–98 and accompanying text.

5. *See infra* notes 94–100 and accompanying text.

6. The law of voluntary obligations includes contracts, *see, e.g.*, NEIL MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND POLITICAL PHILOSOPHY 190 (1982) ("Voluntary obligations are of course those which arise from contracts and promises . . . ."); Aditi Bagchi, *Voluntary Obligation and Contract*, 20 THEORETICAL INQUIRIES L. 433, 435 (2019) ("Contractual obligations are quintessentially voluntary obligations."), as well as restitution insofar as it functions to delimit contract, *see, e.g.*, L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 53 (1936) ("[I]t is impossible to separate the law of contract damages from the larger body of motives and policies which constitutes the general law of contracts."); Michael B. Kelly, *It's Not My Job!*, 36 LOY. L.A. L. REV. 887, 889 (2003) ("Restitution—not just the remedy, but the cause of action for Unjust Enrichment—is integrally tied to the action for breach

As this Article will show, the cohabitant cases evince the strongest iterations of two contested assumptions about contract law.[7] First, courts adjudicating family members' disputes frequently presume that contracting parties interact at arm's length, each seeking to achieve their own individual benefit.[8] As a result, judges tend to measure cohabitants' conduct against one of two paradigms: either what Anita Bernstein has called the "condoned self-regard" of strangers engaged in discrete market exchanges, or the selfless altruism of the family.[9] Because unmarried partners' behavior rarely maps onto the arm's-length paradigm, courts usually code it as altruistic, and therefore beyond the reach of legal obligations.[10] Second, following from the first assumption,[11] courts hearing cohabitant disputes presume that contract law's prevailing purpose is to further private ordering, in particular by giving effect to parties' bargains.[12] Thus unmarried partners'

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of contract. Understanding Restitution is critical to understanding Contracts . . . ."). In addition, as this Article will argue, the law of voluntary obligations must also be understood to include both marital status law and the body of law tasked with governing unmarried partners' property disputes.

7. Although these assumptions are contested as a matter of contract theory, *see infra* notes 8, 12, their strength in the cohabitant context tells us something important about the structure of contract doctrine.

8. *See, e.g.*, Daniel Markovits, *Promise as an Arm's-Length Relation*, *in* PROMISES AND AGREEMENTS: PHILOSOPHICAL ESSAYS 295, 295–96 (Hanoch Sheinman ed., 2011) (arguing that "promises characteristically arise among strangers" and that "the legal practice contract . . . represents promise's highest and most complete expression"); *id.* at 315 ("[C]ontract establishes the highest form of promise *because of* the arm's-length . . . character of contractual promises . . . ."); *cf.* Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 808 (2000) (describing "classical contract law" as "implicitly based on a paradigm of bargains made between strangers transacting in a perfect market . . . . to further their economic self-interest"). *But see, e.g.*, Aditi Bagchi, *Contract as Exchange*, 113 CALIF. L. REV. 1661, 1682–96 (2025) [hereinafter Bagchi, *Contract as Exchange*]; Aditi Bagchi, *Distributive Justice and Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 193, 193 (Gregory Klass, George Letsas & Prince Saprai eds., 2014); Rebecca Stone, *Putting Freedom of Contract in Its Place*, 16 J. LEGAL ANALYSIS 94, 95 (2024).

9. ANITA BERNSTEIN, THE COMMON LAW INSIDE THE FEMALE BODY 8 (2019); *see id.* ("Individuals may favor themselves and what they think are their own interests over the demands that another person makes. Only if they have done something that forces them to subordinate what they want for themselves must they yield to the wishes of another individual."); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1098 (1985) ("[T]here is a common presumption that agreements between intimates are not contractual. While this model of association was developed in husband-wife and parent-child cases, non-marital cohabitants are assumed, for [contract law] purposes, to have the same kind of relationship." (footnote omitted)); *infra* Section II.B.

10. *See infra* Section II.B.

11. *See infra* notes 213–14 and accompanying text.

12. *See, e.g.*, Jody P. Kraus & Robert E. Scott, *The Case Against Equity in American Contract Law*, 93 S. CAL. L. REV. 1323, 1333 (2020) (explaining "contract as vindicating personal sovereignty by honoring the ex ante intentions of contracting parties"); Markovits, *supra* note 8, at 318 ("[T]he court . . . reasons . . . from the point of view of the contract, which it embodies . . . ."); Thomas W. Merrill, *Private and Public Law*, *in* THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 575, 578 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2021) [hereinafter OXFORD HANDBOOK] (describing private law as "the law that supports private ordering," "the law that persons use to structure their lives in relation to others," whereas public law "exists to provide public goods," "general benefits" that cannot "readily" arise absent

claims consistently founder against courts' reluctance to impose obligations that contravene the parties' intentions and understandings, even in the name of fairness.[13] These arm's-length and bargain-favoring assumptions work together to hinder cohabitant claims.

Scholars of nonmarital relationships have identified and criticized the arm's-length and bargain-favoring assumptions, but specifically in terms of ideologies surrounding gender and the family.[14] Under this account, the assumptions' strength in the family context is a vestige of the nineteenth-century contract law from which domestic relations law, the precursor to family law, was said to diverge.[15] This Article offers a complementary but analytically distinct account, one that sits at the nexus of feminist and family law analysis and private law theory.[16] I argue that, in addition to a gendered history, the two assumptions also manifest conceptual gaps in the law of voluntary obligations—gaps that complicate dispute resolution in cases beyond cohabitants' and that undermine important goals of private law whenever they do. Due to the contingencies of doctrinal development, the law of voluntary obligations lacks not only an adequate array of behavioral models to explain closer-than-arm's-length interactions, but also sufficient frameworks to explain when and how concerns beyond effectuating the parties' bargain should shape the content of their obligations. These two conceptual gaps make it difficult for the law of voluntary obligations to govern the full panoply of intimates' bilateral relations.

This Article proposes the concept of *cooperation* as a tool to both identify and help to close these conceptual gaps. I define "intimates" functionally, as individuals engaged in patterns of interactions exhibiting high degrees of

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"some mechanism of collective governance and the use of coercion to promote compliance with collectively determined norms"). *But see* Bagchi, *Contract as Exchange*, *supra* note 8, at 1672 (describing "American will theory" as "reject[ing] state intrusion in contract on substantive grounds but simultaneously demand[ing] state enforcement of terms pronounced by individual will"); Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407, 411 (2016) (describing and defending "the public's interest in . . . remedial decisionmaking").

13. *See infra* Section II.C.

14. *See infra* Section II.A.

15. *See infra* Section II.A.

16. *Cf.* Andrew S. Gold & Henry E. Smith, *Sizing Up Private Law*, 70 U. TORONTO L.J. 489, 489–90 (2020) ("External . . . perspectives on private law . . . . seek to explain or justify private law in terms of some set of criteria outside the law, such as efficiency, fairness, or other non-legal morality. . . . [I]nternal perspectives focus mainly or even exclusively on understanding private law from within and evaluating it in terms of the coherence of the morality immanent in the law itself."); *id.* at 492–93 (arguing for a "more inclusive internalism" that "pay[s]" more "attention to how the 'micro' level of . . . bilateral[] interaction relates to the 'macro' level of society and the law as a whole"); Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith, *Introduction*, *in* OXFORD HANDBOOK, *supra* note 12, at xv, xv (noting that recent work in private law theory "is . . . open[] to considering both internal and external points of view in analyzing the law" and "often combines internal and external perspectives").

cooperation.[17] "The human condition of interdependence means that many of our valuable projects are *joint* projects,"[18] requiring us to work with and rely on others to achieve our ends. We do so in a variety of ways, ranging from thinner, more market-focused collaboration, to kinds of increasingly enmeshed cooperation, to the thick, community-centered enterprise envisioned as the ideal marriage.[19]

Cooperation tends to occur more frequently and to a greater degree in closer social relationships,[20] and is more complex than the arm's-length paradigm in terms of both the parties' reasons for engaging with one another and the extent and depth of their engagement.[21] First, cooperation is often

17. *Cf.* Emily J. Stolzenberg, *Properties of Intimacy*, 80 MD. L. REV. 627, 632 (2021) [hereinafter Stolzenberg, *Properties of Intimacy*] (using "intimacy" to describe "relationships defined by dependence and interdependence," and therefore "special . . . vulnerability"); *id.* at 676 (arguing that such relationships "should be governed by legal rules that encourage cooperative behavior both practically and expressively").

18. HANOCH DAGAN & AVIHAY DORFMAN, RELATIONAL JUSTICE: A THEORY OF PRIVATE LAW 12 (2024).

19. *Compare* Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1419–20 ("claim[ing] that . . . contracts . . . establish a relation of recognition and respect—and indeed a kind of community—among those who participate in them, ... even though contracts typically arise among self-interested parties"), *with* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 77, 82 (2004) (describing "the ideal of marriage as an egalitarian liberal community," in which "spouses perceive themselves at least partially as a 'we,' a plural subject, that is in turn a constitutive feature of each spouse's identity as an 'I'"), *and* Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. U. L. REV. 1623, 1627 (2008) ("Marriage fuses separate individuals into one unit in which efforts, consumption, goals, and decisionmaking are intertwined."), *and* Steven Schaus, *Wrongs to Us*, 121 MICH. L. REV. 1185, 1189 (2023) (arguing that "partners in marriage-like relationships, by acting together in intensive, long-term ways, constitute a genuine 'we[]' . . . in a position to have joint aims and interests").

20. ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH 28–29 (2008) ("[I]ntimates are more likely than those who are socially distant to behave cooperatively as opposed to opportunistically."). To be clear, not all individuals in close social relationships cooperate as an empirical matter. In the context of nonmarital relationships, for example, sociologists have identified a wide range of cohabiting relationships, not all unmarried partners cohabit, and unmarried partners may cooperate (as defined here) to varying degrees. *See, e.g.*, Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 848 (2004) (describing cohabitation as "an incomplete institution"); Brian J. Willoughby, Jason S. Carroll & Dean M. Busby, *The Different Effects of "Living Together": Determining and Comparing Types of Cohabiting Couples*, 29 J. SOC. & PERS. RELATIONSHIPS 397, 406 (2011) (describing five different types of cohabiting couples); *see also* Cynthia Grant Bowman, *How Should the Law Treat Couples Who Live Apart Together?*, 29 CHILD & FAM. L.Q. 335, 335 (2017) (describing pairs "living apart together," or LATs, as "committed unmarried couples who maintain separate residences"); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 94 (2016) ("Nonmarriage is not one single institution, but instead is a continuum of relationships."); Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1025–39 (2018) (describing axes along which nonmarital couples vary).

21. *Cf.* Ira Mark Ellman, *"Contract Thinking" Was* Marvin*'s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1374 (2001) ("[C]ontractual obligations are well-defined in both time and nature, while the reciprocities expected in close social relationships are not. Contractual obligations are discrete while

motivated by something other than, or in addition to, sheer self-interestedness.[22] In the closest forms of cooperation, intimates may cooperate not only to achieve mutual individual benefit, to create and "appropriate . . . value" as solo persons,[23] but also to produce truly collective benefit, to build a joint surplus that is shared between them (at least in part) as a community entity.[24] Second, cooperation tends to present as an ecosystem of closely connected and reciprocal inter-actions, from which it is often difficult to isolate single exchanges, let alone bargained-for exchanges.[25] Both contract law and family law have evolved since their nineteenth-century split in response to more modern forms of cooperation. Contract now captures a much wider array of interactions than its archetype applied in the cohabitant cases would suggest,[26] while marital status law has evolved to offer some protection for the extremely thick cooperation that may occur between spouses.[27] But not enough law has been developed or adapted to

social obligations are embedded in a larger relationship on which they depend for their existence and meaning.").

22. *Cf., e.g.*, Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMANS. 37, 39–40 (1990) (arguing that individual self-regard can't explain the establishment of property systems, which are cooperative endeavors).

23. Markovits, *supra* note 19, at 1420; *id.* ("[C]ontracts typically arise among self-interested parties who aim to appropriate as much of the value that contracts create as they can.").

24. *See infra notes* 216–21 and accompanying text. For an illustration of this idea, consider the animating theory of the tenancy by the entirety: It allows spouses to co-own property through the legal entity of their marriage, which for certain purposes is treated as an indivisible whole. *See, e.g.*, Sawada v. Endo, 561 P.2d 1291, 1295 (Haw. 1977) ("The tenancy by the entirety is predicated upon the legal unity of husband and wife, and the estate is held by them in single ownership. They do not take by moieties, but both and each are seized of the whole estate.").

25. *See, e.g.*, Ellman, *supra* note 21, at 1373–75 (distinguishing between reciprocity and bargained-for exchange); Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1294 (2015) ("[C]ouples [in intimate relationships] often expect reciprocity and equal contributions, but they rarely price their contributions or seek to maximize the return on those contributions."); *see also* ELLICKSON, *supra* note 20, at 29 ("Intimacy . . . facilitates the spontaneous trading of services, in many household situations a method of coordination far more efficient than formal bilateral contracting."); *cf.* Eisenberg, *supra* note 8, at 821 (describing as "flawed" classical contract law's "implicit empirical premise that most contracts are discrete"); Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1371–75 (2002) (arguing that constitutional law presumes the private law model of discrete transactions but should not, because citizens are in ongoing relationships with their government).

26. *See generally* IAN R. MACNEIL, THE NEW SOCIAL CONTRACT (1980) (rejecting classical model of contract as the law of "discrete transactions" and developing relational theory of contract); Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983) (same); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963) (revealing extent to which business disputes may be avoided or resolved through non-legal means); *see also* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1090–91 (1981) (analyzing as "relational contracts" agreements in which "parties are incapable of reducing important terms of the arrangement to well-defined obligations," including such "cooperative exchange relationships" as "distributorships, franchises, joint ventures, and employment contracts").

27. *See infra* Part I.

govern the complex and complexly motivated interactions of other intimates, including unmarried partners. Whereas the gender-based critique explains the cohabitant cases in terms of *too much* intimacy, defined colloquially, this structural explanation posits the problem to be the law's *not* recognizing *enough* intimacy, understood functionally as cooperation.

And when the law of voluntary obligations fails to perceive and protect cooperation, it also fails to further important purposes of private law writ large. Well understood as "the law of interpersonal relationships," private law "structur[es] . . . our private, social, and economic life" and "the ways we live and interact in the world as private persons."[28] Family law *is* private law, at least insofar as it prescribes family members' rights against and duties toward one another.[29] And while scholars offer competing theories to explain both private law as a whole[30] and its many doctrinal sub-areas,[31] there is a great deal of consensus about the kinds of concerns private law is meant to address. These include facilitating joint projects[32] and social life more generally,[33] forestalling

28. DAGAN & DORFMAN, *supra* note 18, at 3; *id.* at 22 ("Private law both protects us from others' encroachments and empowers us in our cooperative endeavors."); *see also* John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012) ("Private law defines the rights and duties of individuals and private entities as they relate to one another.").

29. U.S. family law also contains public law components, at least insofar as the Constitution limits how states may regulate the family. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 501 (1977) (noting that "certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause").

30. *See generally, e.g.*, DAGAN & DORFMAN, *supra* note 18, at 5 (proposing theory of relational justice, under which "private law must be guided by the maxim of reciprocal respect for self-determination and substantive equality"); JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020) (civil recourse); ANDREW S. GOLD, THE RIGHT OF REDRESS (2020) (redressive justice); ARTHUR RIPSTEIN, PRIVATE WRONGS (2016) (corrective justice); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (rev. ed. 2012) (corrective justice).

31. *See* Gold et al., *supra* note 16, at xvi (noting that "[c]ontemporary work in private law theory has tended to focus on tort, contract, property, and unjust enrichment," with "occasional attention" to "fiduciary law").

32. DAGAN & DORFMAN, *supra* note 18, at 35 ("[C]ontract as a legal institution empowers people to solicit the commitments of other people, including total strangers, and insist on their performance even absent any detrimental reliance.").

33. *See, e.g.*, GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 1 (1997) (describing a "view" of "property [a]s the material foundation for creating and maintaining the proper social order"); HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY 51–55 (2021) (describing role of property law in facilitating community); DAGAN & DORFMAN, *supra* note 18, at 35 ("[P]rivate law's terms of interaction . . . empower[] parties to design their social and economic arrangements by forming rights and obligations."); *id.* at 46 ("Property and contract law . . . constitut[e] a variety of stable frameworks of interpersonal cooperation . . . support[ing] divergent forms of interpersonal relationships.").

and providing redress for harm,[34] preventing exploitation,[35] and protecting those in relations of trust.[36] But the law of voluntary obligations falls short of achieving these aims in the cohabitant context. Without doctrinal frameworks that look for cooperation and seek to fairly unwind it, judges cannot properly account for and distribute the kinds of mutual and collective benefits (or joint liabilities) that may accrue between unmarried partners.[37] Instead, the losses of nonmarital relationships tend to lie where they fall, leaving vulnerable co-operators without appropriate remedy.[38]

Finally, this Article considers how private law might better recognize and safeguard cooperation between intimates. To fill in the conceptual gaps identified here, scholars and legal decision-makers should develop doctrine commensurate with the understanding that thicker forms of cooperation are commonplace and deserving of legal protection. This project would benefit not just unmarried partners, but all individuals involved in complexly motivated interactions, as well as private law doctrine and theory more generally. A rigorous account of different kinds of cooperation would have purchase beyond the domain of voluntary obligations, offering insights for areas of private

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34. *See, e.g.*, GOLDBERG & ZIPURSKY, *supra* note 30, at 92–98; GREGORY C. KEATING, REASONABLENESS AND RISK: RIGHT AND RESPONSIBILITY IN THE LAW OF TORTS 2–7 (2022); JOHN OBERDIEK, IMPOSING RISK: A NORMATIVE FRAMEWORK 6, 11 (2017); RIPSTEIN, *supra* note 30, at 7–8; WEINRIB, *supra* note 30, at 134–36.

35. *See, e.g.*, Henry E. Smith, *Property, Equity, and the Rule of Law*, *in* PRIVATE LAW AND THE RULE OF LAW 224, 225 (Lisa M. Austin & Dennis Klimchuk eds., 2014) (stating that "the law must employ a . . . set of moral standards that sound in anti-deception and anti-evasion" to "prevent . . . opportunism," and arguing that "the equitable decision-making mode can serve this function").

36. *See, e.g.*, Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 1000 (2017) ("While other species of private law such as contract, tort, property, and unjust enrichment are capable of neutralizing . . . a private party's capacity for harmful opportunism in an arm's-length relationship, only fiduciary duties and remedies are calibrated to ensure that fiduciaries lack the capacity to betray trust in a fiduciary relationship."); Andrew S. Gold, *The Loyalties of Fiduciary Law*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 176, 190–91 (Andrew S. Gold & Paul B. Miller eds., 2014) (arguing that "all fiduciary relationships . . . employ some conception of loyalty," even though "[d]ifferent types of relationship may implicate different types of trust"); Matthew Harding, *Trust and Fiduciary Law*, 33 OXFORD J. LEGAL STUD. 81, 85 (2013) ("[F]iduciary relationships are likely to be characterized by relatively thick trust."); Paul B. Miller, *The Fiduciary Relationship*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63, 73 (Andrew S. Gold & Paul B. Miller eds., 2014) (naming "inequality," "dependence," and "vulnerability" as the "three related structural properties of the fiduciary relationship").

37. *Cf.* Marvin v. Marvin, 557 P.2d 106, 121 (Cal. 1976) (in bank) ("[P]arties to a nonmarital relationship . . . may well expect that . . . the courts will fairly apportion property accumulated through mutual effort.").

38. *Compare* DAGAN & DORFMAN, *supra* note 18, at 36 ("[P]rivate law . . . . sets the rules of the various games of our social and economic lives."), *and id.* at 50 ("[J]ust terms of interaction cannot allow the (monetary and non-monetary) costs of possessing constitutive features and choices to be borne solely by their possessor."), *with* Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497–98 (1992) (listing among family law's "functions" "protect[ing] citizens against harms done them by other citizens").

law concerned with shared resources, for example the property doctrine of waste and rules governing contemporaneous co-ownership; cooperative endeavors, like family businesses and friends' start-ups; and relationships of trust, such as fiduciary law's "sole interest" rule.[39] Moreover, institutionalizing legal norms that *all* cooperation's risks and rewards should be fairly distributed would better align the law of voluntary obligations with torts and equity, which more openly acknowledge the collective's interests in the content of private law obligations. Normalizing inquiries beyond the bargain in private-ordering disputes would permit scholars, courts, and legislatures to openly debate which values and norms should guide judges' decisions when intimate cooperation breaks down. Such an orientation would also lay the groundwork for a richer, more nuanced body of private law doctrine and theory—one that comprehends, rather than excludes, intimate relations and obligations.

This Article proceeds as follows. Part I sets the stage by explaining how, at least as compared with the current law of cohabitants, marital status law recognizes and protects the potentially extensive cooperation between spouses. Not only do states' divorce distribution regimes presume that spouses are engaged in a joint project that entitles each to a fair share of the endeavor's surplus (or liabilities) if the relationship ends. States also impose a variety of limits on marital contracting to reflect the closeness of spouses' relationships and the extent of their cooperation. Part II explains how, for contingent and self-perpetuating reasons, the law of voluntary obligations fails to recognize and protect unmarried partners' cooperation. Part III sketches how scholars and legal decision-makers might begin to develop doctrine to fairly disentangle cohabitants' cooperation and suggests how the concept might improve adjudication of a range of private law disputes. I conclude by situating intimates' relations within the broader ambit of private law and private law theory.

I. Marital Status Law and Intimacy

To understand the law of voluntary obligations' deficits in recognizing intimates' cooperation, consider first its starkest legal contrast: marital status law. The result of a long struggle for law reform,[40] today's marital status law

39. *See infra* Section III.B.

40. *See generally* Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017 (2000); HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988) (discussing nation-wide changes to divorce, property distribution, and child custody law in the 1970s and 1980s); Mary Ziegler, *An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform*, 19 MICH. J. GENDER & L. 259 (2013) (offering "first comprehensive history of the role of women" in the "divorce revolution").

is not perfect,[41] but it does provide significant default legal protection for cooperation between spouses.

These protections are extremely important and necessary, for spouses' cooperation may be of a particularly intimate and intertwined nature. Not only may spouses mingle their property, care for one another physically and emotionally, and have and raise children together;[42] they may also build their lives around one another and the family they've created, making both day-to-day and major life decisions based at least in part on the interests of the marital and the family community.[43] Indeed, feminist and family law scholars have long detailed how the often extensive cooperation of marriage can leave individual spouses vulnerable at divorce.[44] They've also pointed out that the trust inherent within the marital relationship makes individual spouses particularly susceptible to the other's contractual overreach.[45]

As this Part details, states have responded to these concerns in two ways. First, states have developed marital property regimes that instantiate the idea that marriage is a cooperative project.[46] Equitable distribution law in particular

41. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 4–5 (1991); MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 86–91 (1987); ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 79–87 (1992); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA, at xi–xiv, 323, 355–62 (1985); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 1005–09 (1991); Elizabeth R. Carter, *The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality*, 48 IND. L. REV. 853, 860 (2015); Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 277, 287–90 (1987); Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 305–09 (1987); Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over the Marital Community*, 81 B.U. L. REV. 59, 62 (2001); Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413, 1415–18 (1996); Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2306–08 (1994); Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, *in* DIVORCE REFORM AT THE CROSSROADS 191, 195 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 542–44 (1990); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 55–67 (1996); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1113–14 (1989); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 690–91, 730–43 (1990); Stolzenberg, *Properties of Intimacy*, *supra* note 17, at 639–52; Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2273–75 (1994).

42. *Cf.* Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 18–19, 20, 21 (2012) (noting that marriage "functions as a proxy for financial interdependence," "commitment and relative exclusivity," "cohabitation," and "a conjugal family").

43. *Cf.* Motro, *supra* note 19, at 1627 ("Marriage fuses separate individuals into one unit in which efforts, consumption, goals, and decisionmaking are intertwined.").

44. *See supra* note 41.

45. DAGAN & DORFMAN, *supra* note 18, at 136.

46. Marital property regimes operate differently at three distinct "moments" of marriage: during an ongoing marriage, at one spouse's death, and at divorce. *See, e.g.*, Laura A. Rosenbury,

presumes that members of a married couple construct a joint life together, and therefore assigns legal rights and obligations to fairly distribute the benefits and burdens of that cooperation if a marriage ends.[47] Second, many jurisdictions also impose procedural and substantive limits on marital contracting, overriding spouses' bargains when their negotiation suggests violations of trust or they result in particularly lopsided distributions of a relationship's assets and liabilities.[48] As a result, marital status law both protects spouses' cooperation and requires some scrutiny of their private orderings to ensure that the latter do reflect (or at least don't too seriously undermine) the social interests implicated in the marital relationship.

A. Marital Property Regimes and Spousal Cooperation

Marital status law recognizes and protects spouses' cooperation primarily through equitable distribution regimes. All U.S. jurisdictions have systems of divorce distribution that reflect the premise that spouses' efforts during marriage, whether in the market or the household, contribute to the good of the marital community.[49] This premise, which reflects the so-called partnership theory of marriage,[50] views the spouses as cooperating to contribute to the benefit of the family community, an entity beyond (and complexly related to) their individual selves.[51]

As a doctrinal matter, these divorce distribution regimes identify a corpus of property jointly owned by the spouses, which is then valued and distributed equitably (or, in some states, equally).[52] States usually define the "marital property" or "community property" subject to distribution as all property acquired during the marriage except for categories of acquisitions classified

Two Ways to End a Marriage: Divorce or Death, 2005 UTAH L. REV. 1227, 1274–76 (comparing divorce and inheritance regimes); Stolzenberg, *Properties of Intimacy*, *supra* note 17, at 640 (describing property regimes during marriage). This Article focuses on property rights at divorce, because separation and divorce represent the moment when spousal cooperation breaks down.

47. *Cf.* UNIF. MARRIAGE & DIVORCE ACT prefatory note, at 4 (UNIF. L. COMM'N 1973) (concluding that "[t]he distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident[al] to the dissolution of a partnership").

48. *See, e.g.*, Brian H. Bix, *Family Law: Values Beyond Choice and Autonomy?*, 40 LAW & PHIL. 163, 164 (2021).

49. *See, e.g.*, DOUGLAS E. ABRAMS, NAOMI R. CAHN, LINDA C. MCCLAIN, CATHERINE J. ROSS, KAIPONANEA T. MATSUMURA & JESSICA DIXON WEAVER, CONTEMPORARY FAMILY LAW 661 (6th ed. 2023) (both common-law and community-property states "divide property acquired during the marriage" upon divorce); Rosenbury, *supra* note 46, at 1230.

50. *See* UNIF. MARRIAGE & DIVORCE ACT prefatory note, at 4; *supra* note 47 and accompanying text.

51. *See supra* notes 19, 43, and accompanying text; *see also* Bender v. Pfaff, 282 U.S. 127, 131 (1930) (noting Louisiana statutes referring to the marital relation as a "partnership or community").

52. *See, e.g.*, Stolzenberg, *Properties of Intimacy*, *supra* note 17, at 645–46 (describing equitable distribution regimes).

as "separate property"— "generally . . . property acquired before marriage[] or through gift or inheritance bestowed upon only one spouse."[53] The principle dividing marital or community property from separate property is the spouses' efforts during marriage: "Earnings from labor are marital property because marriage is considered a joint venture to which each spouse contributes a combination of effort, sacrifice, and mutual support."[54] Marital or community property includes liabilities as well as assets; debts acquired by either spouse during the marriage for the good of the family are also subject to distribution on divorce.[55] After determining the content of the marital or community estate and valuing that joint property, the judge then divides the estate between the spouses. A few states impose a presumption of equal division;[56] in the majority of states that prescribe "equitable" division, a judge must consider a number of factors, enumerated by either statute or case law, to arrive at a "fair" or "just" distribution.[57] These "equitable distribution" factors usually capture the competing considerations of spouses' respective contributions to the marital

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53. ABRAMS ET AL., *supra* note 49, at 662; *see, e.g.*, CAL. CONST. art. 1, § 21 ("Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property."); CAL. FAM. CODE § 760 (West 2020) (defining community property); *id.* § 770 (defining separate property); *id.* § 2550 (generally requiring equal division of community property); 23 PA. CONS. STAT. § 3501(a) (2019) (defining marital property); *id.* § 3502(a) (describing process for "[e]quitable division of marital property"). The exceptions are the eleven "hotchpot" or "kitchen sink" jurisdictions, in which courts may divide all property owned by the spouses individually or jointly, regardless of when or how it was acquired. ABRAMS ET AL., *supra* note 49, at 664–65.

54. Motro, *supra* note 19, at 1624; *see also* ABRAMS ET AL., *supra* note 49, at 662 (describing "principle" of marital property as "the labor and contributions of either spouse during marriage creates a body of mutual assets"). The labor principle is even more explicit in states that assign appreciation of separate assets to the marital estate when the increase is the product of a spouse's active management. *Compare, e.g.*, OHIO REV. CODE ANN. § 3105.171(A)(3)(a)(iii) (West 2011) (defining marital property to include "all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage"), *with id.* § 3105.171(A)(6)(a)(iii) (defining separate property to include "[p]assive income and appreciation acquired from separate property by one spouse during the marriage").

55. *See, e.g.*, Huguelet v. Huguelet, 439 S.E.2d 208, 210 (N.C. Ct. App. 1994) (defining "[a] marital debt" as "one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties"); *In re* Marriage of Christensen, 292 P.3d 568, 572 (Or. Ct. App. 2012) (noting "distinction between marital debts and debts" incurred during marriage "that benefit[] only one of the parties" and stating that "equal division" of "debt[s] . . . incurred to pay family expenses" "is generally appropriate").

56. *See, e.g.*, CAL. FAM. CODE § 2550 (generally requiring equal division of community property); IND. CODE ANN. § 31-15-7-5 (West 2018) (requiring equal division of marital property unless "an equal division would not be just and reasonable"); NEV. REV. STAT. § 123.259(3)–(4) (2023) (requiring equal division unless narrow circumstances apply).

57. *See, e.g.*, MD. CODE ANN., FAM. L. § 8-205(b) (West 2026) (setting forth factors and instructing court "to arrive at a fair and equitable" result); 23 PA. CONS. STAT. § 3502(a) (distribution as "the court deems just"); *see also* OR. REV. STAT. § 107.105(f) (2023) ("division . . . as may be just and proper in all the circumstances").

estate and their post-marital financial needs.[58] Even in the equitable distribution states, distributions tend toward equal, or nearly equal, divisions of assets in most cases.[59]

Although sophisticated parties can contract around them to some degree,[60] marital property regimes instantiate a default assumption that, on relationship dissolution, both spouses are entitled to a fair portion of the joint surplus (or liabilities) resulting from the marital enterprise. In this way, marital property law protects spouses' cooperative efforts to further their joint lives and protects their reliance that relationship-related benefits and burdens will be fairly distributed if the marriage ends.

B. Marital Contracts and Limits on Private Ordering

Marital status law is also sometimes willing to scrutinize and even override spouses' bargains in the name of public interests and values. Although all states allow premarital and married couples to execute valid contracts that establish their respective property rights in ways that may depart from the background laws of equitable distribution and spousal support,[61] jurisdictions differ in the

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58. *Compare, e.g.*, 23 PA. CONS. STAT. § 3502(a)(7) (requiring court to consider "[t]he contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker"), *with id.* § 3502(a)(5) ("[t]he opportunity of each party for future acquisitions of capital assets and income"), *and id.* § 3502(a)(8) ("[t]he value of the property set apart to each party"), *and id.* § 3502(a)(10) ("[t]he economic circumstances of each party at the time the division of property is to become effective").

59. Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 673 (1991) (finding "a trend toward approximately equal division"). Exceptions to near-equal divisions often fall into recognizable fact patterns, for example, extremely high-value marital estates, *see, e.g.*, Wendt v. Wendt, 757 A.2d 1225, 1233 (Conn. App. Ct. 2000); David N. Hofstein, Scott J.G. Finger, Charles J. Meyer & Ellen Goldberg Weiner, *Equitable Distribution Involving Large Marital Estates*, 26 J. AM. ACAD. MATRIM. LAWS. 311, 355–56 (2014), or egregious marital behavior, including intra-partner violence, *see* Student Editorial Staff, *Charts 2020: Family Law in the Fifty States, D.C., and Puerto Rico, Part 2*, 55 FAM. L.Q. 211, 215–26 (2022) (listing jurisdictions that permit courts to consider "non-economic fault" in distributing property).

60. *See infra* Section I.B.

61. *See, e.g.*, JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 210 (2011) (observing that all states permit "couples [to] enter into enforceable prenuptial agreements that spell out the economic consequences of divorce"); Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 13–14 (2012) (noting trend toward greater enforceability of marital contracts); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 148–58 (1998); Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 828–32; *see also* Emily J. Stolzenberg, *Nonconsensual Family Obligations*, 48 BYU L. REV. 625, 645–47 (2022) [hereinafter Stolzenberg, *Nonconsensual Family Obligations*] (describing how obligations under spousal contracts may diverge significantly from the obligations that state marital status law would impose). I focus here on premarital and marital contracts, rather than separation agreements entered into in contemplation of divorce or legal separation, because courts generally approve the latter without modification. *See, e.g.*, Bix, *supra* note 48,

latitude they permit marital private ordering. Many states impose procedural and substantive limits on spousal contracts that reflect a range of collective concerns implicated in the marital relationship.[62]

Consider first premarital agreements, or contracts entered into in contemplation of marriage "in which the spouses-to-be agree to modify the financial terms to be applied at divorce, or upon the death of one of the spouses."[63] States impose a variety of procedural requirements to ensure that would-be spouses' bargains are informed and sufficiently voluntary,[64] including writing and other formalization requirements;[65] disclosure requirements;[66] requirements that parties either consult, or have a meaningful opportunity to obtain advice of, independent counsel;[67] and waiting periods.[68] Many jurisdictions review challenges to prenuptial agreements based on involuntariness, duress, or

at 164–66; *cf.* ABRAMS ET AL., *supra* note 49, at 1058 ("[S]tatutes in almost all states . . . affirmatively *encourage* . . . private settlement in divorce.").

62. Bix, *supra* note 48, at 164; *cf.* ABRAMS ET AL., *supra* note 49, at 1071 (noting that, in the "[n]early half of states [that] have not adopted the UPAA," "most" jurisdictions "requir[e] that prenuptial agreements be procedurally and substantively fair").

63. Bix, *supra* note 48, at 164.

64. *Cf.* PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 7.04(2) (AM. L. INST. 2002) [hereinafter ALI PRINCIPLES] ("A party seeking to enforce an agreement must show that the other party's consent to it was informed and not obtained under duress."). *See generally id.* § 7.04 ("Procedural Requirements").

65. *See, e.g.*, N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 2010) (requiring marital contracts be "in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded"); ARK. CODE ANN. § 9-11-402 (2020) ("[A]greement[s] must be in writing[,] signed[,] and acknowledged."); *cf.* ALI PRINCIPLES § 7.04(1) ("An agreement is not enforceable if it is not set forth in a writing signed by both parties.").

66. *See, e.g.*, Mallen v. Mallen, 622 S.E.2d 812, 814 (Ga. 2005) (one factor in determining "validity of a prenuptial agreement" is whether agreement was "obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material facts"); UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(d) (UNIF. L. COMM'N 2012) (defining "adequate financial disclosure"); *cf.* ALI PRINCIPLES § 7.04(5) (requiring "at least approximate[]" knowledge of "assets and income").

67. *See, e.g.*, *In re* Est. of Hollett, 834 A.2d 348, 352 (N.H. 2003) ("Fairness demands that the party presented with the agreement have 'an opportunity to seek independent advice and a reasonable time to reflect on the proposed terms.'" (citing Lutgert v. Lutgert, 338 So. 2d 1111, 1116 (Fla. Dist. Ct. App. 1976))); UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(b) (UNIF. L. COMM'N 2012) (defining "access to independent legal representation"); *cf.* ALI PRINCIPLES § 7.04(3)(b) (requiring "reasonable opportunity" to "obtain independent legal counsel"); *id.* § 7.04(3)(c) (requiring either "assistance of independent legal counsel" or plain-language explanation how the agreement "alter[s]" marital rights and statement that the spouses' "interests . . . with respect to the agreement may be adverse").

68. CAL. FAM. CODE § 1615(c)(2) (West 2020) (deeming involuntary premarital agreements executed "less than seven calendar days" after their initial presentation); MINN. STAT. § 519.11 subd. 1b(c) (2025) ("An agreement that is entered into and executed less than seven days before the marriage is not presumed enforceable, and the proponent of the agreement has the burden of proof."); *cf.* ALI PRINCIPLES § 7.04(3)(a) (extending presumption of validity to premarital agreements "executed at least 30 days before the parties' marriage").

unconscionability at the time of execution under heightened standards, as compared to commercial agreements.[69] Finally, many states also recognize a confidential relationship between persons engaged to be married, the existence of which "imposes a higher duty with regard to contracts . . . than exists between other contracting parties."[70] The confidential relationship doctrine especially illustrates the driving principle behind the various procedural safeguards states employ: Persons entering into the marital relationship should not be expected to actively defend their individual interests like arm's-length strangers. Instead, each should be "entitl[ed] . . . to repose" some degree of "confidence and trust in the other."[71]

States also impose substantive limits on premarital contracts that reflect the public's interest in the marital relationship. These include assessing contract terms for substantive fairness at the time enforcement is sought, as well as restricting waivers of spousal support. Consider, for example, the 2012 Uniform Premarital and Marital Agreement Act ("UPMAA"). Responding to states' divergence from the 1983 Uniform Premarital Agreement Act ("UPAA") in the direction of more stringent "procedural and substantive fairness requirements for enforceability,"[72] the UPMAA includes an optional provision permitting courts to refuse to enforce an agreement term that would work a "substantial hardship."[73] A state enacting this optional provision, or adopting a similar

69. *See, e.g.*, *Hollett*, 834 A.2d at 352 (referring to "the heightened scrutiny afforded to prenuptial agreements").

70. Mallen v. Mallen, 622 S.E.2d 812, 815 (Ga. 2005) (citing cases and noting concomitant "burden of acting in 'the utmost good faith'" (citation omitted)); ABRAMS ET AL., *supra* note 49, at 1077 (noting "the strong majority rule," among the half of States that are not UPAA or UMPAA jurisdictions, "that an engaged couple negotiating a premarital agreement occupies a confidential relationship").

71. *Mallen*, 622 S.E.2d at 815; *cf.* ALI PRINCIPLES § 7.02 cmt. c (2002) ("The distinctive expectations that persons planning to marry usually have about one another can disarm their capacity for self-protective judgment, or their inclination to exercise it, as compared to parties negotiating commercial agreements."); Brian H. Bix, *Private Ordering in Family Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CHILDREN'S AND FAMILY LAW 257, 260 (Elizabeth Brake & Lucinda Ferguson eds., 2018) (noting that "[t]he context of love, optimism, and trust in which . . . family agreements are often entered stops parties from being sufficiently reflective and self-protecting").

72. Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 314–15 (2012); *see also* J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL'Y 83, 85–88 (2011) (documenting states adopting UPAA but permitting courts to assess unconscionability at time of divorce, not just execution).

73. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(f)(2) (UNIF. L. COMM'N 2012) ("A court may refuse to enforce a term of a premarital . . . or marital agreement if . . . enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed."); *cf.* ALI PRINCIPLES § 7.05 ("When Enforcement Would Work a Substantial Injustice").

position through other means,[74] limits how far parties may agree to deviate from the background divorce distribution regime—and in so doing, enforces a public view of what the proper distribution of marital benefits and burdens should be.[75] It is true that the UPMAA's (non-optional) provision allowing courts not to enforce waivers of spousal support that "cause[] a party . . . to be eligible for support under a program of public assistance" at the time of enforcement reflects a public policy more of privatizing dependency—that the former spouse, not the people of the state, should be responsible for supporting an impecunious divorcé(e)—than of protecting marital cooperation.[76] However, even this provision requires at least some level of post-marital sharing in derogation of the spouses' bargain. And whether courts assess entire agreements for substantive fairness or only revisit waivers of spousal support, the underlying principle is the same: Even if spouses have satisfied the necessary formalities in executing their premarital agreements, the public interest in protecting marital cooperation is too strong to allow their bargains to produce certain outcomes.

Consider next procedural and substantive limits on postmarital agreements, or contracts entered into during an ongoing marriage.[77] Again, jurisdictions adopt different approaches: "Some jurisdictions treat them under the same standards as premarital agreements," while "some impose more exacting procedural and substantive standards (on the basis that there are dangers of coercion in marital agreements beyond those present in premarital agreements)."[78] In either case, the principles animating these limitations are the same ones at work in the context of premarital agreements. Not only do the contracting parties not occupy an arm's-length relationship, but the very nature of the marital relationship calls for greater state scrutiny to ensure that proposed spousal bargains don't contravene important public interests.

Sometimes states identify so great a public interest in the marital relationship that they set certain topics entirely off-limits to spousal bargaining. This phenomenon explains jurisdictions' general resistance, until the 1970s, against

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74. *See* ABRAMS ET AL., *supra* note 49, at 1071 (in non-UPAA jurisdictions, "[s]tate law often permits courts to assess substantive fairness both at the time of execution and at the time enforcement is sought").

75. *Cf.* Bix, *supra* note 48, at 175 (stating that state-set "terms" of marriage "reflect a judgment regarding what arrangements will best serve the parties in the arrangement, third parties, and the social interest generally").

76. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(e) (UNIF. L. COMM'N 2012); UNIF. PREMARITAL AGREEMENT ACT § 6(b) (UNIF. L. COMM'N 1983); Brian H. Bix, *Relational Justice and Family Agreements*, LAW & PHIL. 1, 7 n.20 (Dec. 29, 2025), https://doi.org/10.1007/s10982-025-09554-3 [https://perma.cc/PN9M-AY42]; *see also* Oldham, *supra* note 72, at 85–88 (describing approaches of states that adopted the UPAA but modified its provisions regarding waiver of spousal support).

77. Bix, *supra* note 48, at 165.

78. *Id.*

enforcing premarital contracts purporting to alter spouses' rights upon divorce.[79] States still insist that spouses may not contract around duties that they take to be central to the marital relation.[80] For an illustration, consider the California case of *Borelli v. Brusseau*, in which an appellate court declared unenforceable a husband's promise to leave his wife property in exchange for her promise to care for him round-the-clock at home, rather than place him in a nursing home.[81] The court reasoned that the agreement was "void as against public policy" because "a spouse is not entitled to compensation for" fulfilling her "marital duty of support."[82] To be sure, this holding has been widely criticized; the dissenting justice described it as creating in the wife a "nondelegable duty to clean the bedpans herself,"[83] while feminists and family law scholars have decried the *Borelli* principle as prohibiting marital labor from serving as consideration for increased property rights.[84] What matters for the purpose of my argument, however, is the fact that states do police spouses' private orderings to reflect values inherent in the marital relation (even if their interpretation of those values is sometimes outdated).[85]

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Although it does so imperfectly, today's marital status law protects cooperation between spouses through equitable distribution and by scrutinizing marital bargains to further the public's interests in marriage (however those interests may be defined). Ensuring that spousal cooperation's benefits and burdens don't fall too unfairly if a relationship ends makes it safer for married partners to invest their efforts and resources in the project of building and maintaining their family community—a project of significant importance for society, as well as for the spouses.

II. PRIVATE LAW AND INTIMACY

Although spouses' intimate cooperation enjoys legal protection, cohabitants' does not. Unmarried couples are universally excluded from marital

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79. *See, e.g.*, Bix, *supra* note 48, at 164; Silbaugh, *supra* note 41, at 29.

80. *Cf.* RESTATEMENT (SECOND) OF CONTS. § 190(1) (AM. L. INST. 1981) (declaring "unenforceable on grounds of public policy" terms that would "change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship").

81. Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 17–18 (Ct. App. 1993).

82. *Id.* at 19–20; *see also id.* at 20 (declaring that "the duty of support can no more be 'delegated' to a third party than the statutory duties of fidelity and mutual respect").

83. *Id.* at 20 (Poché, J., dissenting).

84. *See, e.g.*, Silbaugh, *supra* note 41, at 32–36; Joan Williams, *Do Wives Own Half? Winning for Wives After* Wendt, 32 CONN. L. REV. 249, 257–58 (1999).

85. *See* Silbaugh, *supra* note 41, at 30 (describing the "special consideration doctrine [of] the marital context" as "an exception to today's contract law" that "reflects a formalism . . . consistent with contract law in the early twentieth century, at the time that this doctrine developed").

property regimes,[86] and only a few U.S. jurisdictions have developed relationship-based alternatives for them.[87] Thus, nonmarital couples must make recourse to generally applicable private law if they wish to unwind their cooperative efforts when their relationships end. As the California Supreme Court famously announced in the 1976 case, *Marvin v. Marvin*, courts asked to distribute property acquired during a nonmarital relationship should "employ . . . doctrine[s]" such as "express contract," "implied contract," "partnership or joint venture," "quantum meruit," and "equitable remedies such as constructive or resulting trusts," as "warranted by the facts of the case."[88] Yet almost fifty years after *Marvin* opened the door to cohabitant recovery, courts continue routinely to reject unmarried partners' contract and unjust-enrichment claims.[89] Although *Marvin* represents the majority approach to cohabitants' disputes,[90] a few states simply refuse to permit such claims as a matter of public policy.[91] Moreover, "[e]ven in states that recognize remedies for nonmarital cohabitants, some courts are nonetheless reluctant to award relief."[92] This reluctance means that

86. *See, e.g.*, *In re* Mallett, 37 A.3d 333, 338 (N.H. 2012) ("[New Hampshire's] statutory scheme plainly restricts all divorce remedies and property distribution to married couples."); *see also* Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 940 (2019) [hereinafter Joslin, *Autonomy*] (noting courts' reasoning that "the claimant does not fall within the statute" and "[a]ny change in that regard must be made by the legislature").

87. These include Washington State's "committed intimate relationship" doctrine, under which "a long-term marriage-like cohabitation with a sharing of finances and other indicia of an interdependent relationship can give rise to a presumptive application of community property principles, both at dissolution and at death, but not to ongoing support obligations," UNIF. COHABITANTS' ECON. REMEDIES ACT prefatory note, at 2 (UNIF. L. COMM'N 2021); *see, e.g.*, *In re* Marriage of Pennington, 14 P.3d 764, 770 (Wash. 2000); *see also* Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2024 (2018) (discussing Washington's approach), as well as Alaska's "domestic partnership" doctrine, under which "marriage-like relationship[s] between unmarried cohabitants" can give rise to post-relationship property distribution, *e.g.*, Tomal v. Anderson, 426 P.3d 915, 923–24, 925 (Alaska 2018). However, such "approach[es] . . . represent[] a *distinct minority approach* in the United States." Courtney G. Joslin, *Nonmarriage: The Double Bind*, 90 GEO. WASH. L. REV. 571, 601 (2022) [hereinafter Joslin, *Double Bind*]; *id.* (observing that jurisdictions with relationship-based approaches "can be counted on one hand").

88. Marvin v. Marvin, 557 P.2d 106, 110 (Cal. 1976) (in bank).

89. *Compare id.* at 110 (authorizing cohabitants' private law remedies), *with, e.g.*, CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW AND PUBLIC POLICY 51 (2010) (questioning efficacy of contract remedies), *and id.* at 42 (criticizing relief in restitution as both "hard to obtain" and "pitifully small"). *But cf.* HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 166–67 (2004) (arguing that restitution supplies "the main source" of cohabitant recovery).

90. *See* Joslin, *Autonomy*, *supra* note 86, at 920 (stating that *Marvin* "still accurately describes the dominant approach today"); *cf.* UNIF. COHABITANTS' ECON. REMEDIES ACT prefatory note, at 1 (UNIF. L. COMM'N 2021) ("affirming the capacity of each cohabitant to contract with . . . and to claim a contract or equitable remedy against the other[,]" "without regard to any intimate relationship that exists between [them]").

91. *See, e.g.*, Hewitt v. Hewitt, 394 N.E.2d 1204, 1209–11 (Ill. 1979), *reaff'd*, Blumenthal v. Brewer, 2016 IL 118781, 69 N.E.3d 834; Long v. Marino, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994); Schwegmann v. Schwegmann, 441 So. 2d 316, 322–24 (La. Ct. App. 1983).

92. UNIF. COHABITANTS' ECON. REMEDIES ACT prefatory note, at 4 (UNIF. L. COMM'N 2021).

unmarried partners lack "predictable" access to private law remedies when they "dissolve their relationship[s]."[93]

Scholars studying nonmarital relationships have long criticized how courts adjudicate cohabitant claims. They tend to interpret the outcomes of unmarried partners' suits through the lens of gendered ideas about family relationships, with judges' skepticism reflecting a modern iteration of the longstanding and wide-ranging body of law constructing and imposing a false dichotomy between relations of "labor" and of "love."[94] In particular, judges' hesitation to vindicate cohabitant claims reflects legally entrenched separate-spheres ideology, which presupposes a stark divide between the "separate spheres" of market and family and deems private law obligations appropriate in the former but not the latter.[95] "Family law exceptionalism" then works hand-in-hand with separate-spheres ideology to further justify the different legal treatment

93. *Id.*

94. *See, e.g.*, Silbaugh, *supra* note 41, at 4 ("[A] wide range of legal doctrines treat women's home work as if it were not value-producing labor. Instead, the U.S. legal system conceptualizes housework as solely an expression of affection, the currency of familial emotions."); *see also* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 844 (2004) [hereinafter Hasday, *Canon of Family Law*] (arguing that doctrines like "the prohibition on interspousal contracts for domestic services" "originated as part of common law coverture, and . . . continue[] to preserve substantial elements of the coverture regime"); Nina A. Kohn, *For Love and Affection: Elder Care and the Law's Denial of Intra-Family Contracts*, 54 HARV. C.R.-C.L. L. REV. 211, 213–14 (2019) (arguing that "elder care provided by family members is frequently construed as non-economic activity and that intra-family contracts for elder care are viewed as suspect and non-binding"—a "response" that "is shaped . . . by entrenched historical expectations about familial roles, including the assumption that women care for family members out of 'love and affection,' and therefore should not expect payment for their labor"); Yiran Zhang, *Home as Non-Workplace*, 105 B.U. L. REV. 911, 914 (2025) (describing and critiquing an "ideological . . . . vision [that] projects, presumes, and constructs the home as . . . lacking legal 'workplace-ness,' even when work happens in it").

95. *See, e.g.*, Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988) (discussing history of "the metaphor of separate spheres"); Martha Minow, *"Forming Underneath Everything that Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819, 835–36 & nn. 60–63 (presenting historians' and legal scholars' accounts of the nineteenth century rise of "separate spheres of ideology"); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498 (1983) (describing the "ideological" "assumptions" of "the market/family dichotomy," or "the idea that the market structures our productive lives and the family structures our affective lives"); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2202 (1994) (describing how "courts . . . drew upon the gender discourse of the industrial era to define family and market as spheres of 'altruistic' and 'interested' exchange," thereby "creat[ing] the legal infrastructure of the separate-spheres tradition"); *see also* Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMPAR. L. 753, 753 (2010) (contending that "the nineteenth century emergence of Family Law as a distinct legal topic . . . was an intrinsic element of the rise of contract as the law of the market").

of family members as compared with other legal subjects,[96] with the result that most intimate exchanges are declared beyond the realm of private law obligation.[97] Viewed in this light, courts' treatment of unmarried partners poses again the longstanding question why some relations—those arising in the context of the family or the home, or marked by affection or closeness[98]—are "immune from the expectation of return."[99] The problem under this gender-based critique is courts seeing *too much* intimacy, as colloquially understood.[100]

The gender-based critique holds the most explanatory power in the outlier jurisdictions that reject all claims arising out of nonmarital relationships or that impose contract disabilities between spouses as a matter of public policy.[101] The claims rejected in such cases are often perfectly legible under current private law doctrine, suggesting a level of ideologically based hostility toward unmarried partners or toward market-like interactions between intimates.[102] Cohabitant cases arising in other jurisdictions, however, support an alternative explanation: Courts struggle to adjudicate cohabitant disputes for reasons that, though consistent with feminist analyses, implicate fundamental principles of private law. Namely, in contrast with marital status law,[103] the private law applied to cohabitants is conceptually insufficient to deal with intimates' cooperation.[104]

96. Halley & Rittich, *supra* note 95, at 753–55 (defining "family law exceptionalism" as "the myriad ways in which the family and its law are deemed, either descriptively or normatively, to be special" and setting forth project of "de-exceptionalizing the family from the market"); *cf.* JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 15 (2014) (noting that although "[o]ne of the guiding concepts that judges, legislators, and commentators often invoke to describe and explain family law is the idea of family law's exceptionalism," "family law actually resembles other legal arenas much more closely than the premise of family law exceptionalism suggests").

97. *See, e.g.*, Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 80 (2021) [hereinafter Antognini, *Nonmarital Contracts*] ("[T]he freedom to contract in this intimate space is limited in ways that reinforce the separation between market and family . . . ."); *id.* at 94 n.133 ("[L]imits based on relationship status have drifted into limits based on the nature of all relationships."); Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2144 (2019) (arguing that "principles underlying" the law of coverture shape not only marital status law, but also private law adjudication of unmarried partners' property disputes); Joslin, *Double Bind*, *supra* note 87, at 574–75 ("[C]ourts decline to apply private law principles to ventures or exchanges that are *too family-like*.").

98. *Cf.* Silbaugh, *supra* note 41, at 5 (arguing that "courts and other legal actors repeatedly decline opportunities to treat housework as work because of the affectionate familial context in which the work is performed," and "denying housework its status as work is costly to those who perform it").

99. I thank Rachel Rebouché for this elegant formulation.

100. *Cf.* Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 493 (2005) [hereinafter Hasday, *Intimacy and Economic Exchange*] ("One of the primary ways that the law constitutes intimate relations *as intimate* is by regulating how economic resources are exchanged within them.").

101. *See supra* note 91; *infra* Section II.A.

102. *See infra* notes 117–18 and accompanying text.

103. *See supra* Part I.

104. *See infra* Sections II.B–.C.

The arm's-length and bargain-favoring assumptions identified by feminists and family law scholars each reveal a related conceptual deficiency. First, courts mischaracterize unmarried partners' behavior as selfless because archetypal contract law lacks paradigms for accurately describing the kinds of cooperation typical in close relationships. Without frameworks to make intimates' complex and complexly motivated interactions legible,[105] courts tend to view cohabitants' expectations of post-relationship property redistribution as legally ungrounded.[106] Second, courts hesitate to impose obligations on cohabitants absent a "recognizable" agreement because archetypal contract law provides little guidance regarding how to fairly distribute the benefits and burdens of intimates' cooperation.[107]

These conceptual gaps—inadequate behavioral models to explain and insufficient principles to govern closer-than-arm's-length interactions—are likely the product of path-dependent common-law development. Modal cases matter for building legal doctrines and theories,[108] and for historically contingent reasons, private law case law has evolved mainly out of disputes between relative strangers. Indeed, multiple legal mechanisms worked to actively suppress disputes between family members and intimates. Eighteenth-century rules of coverture subsumed the wife's legal person into her husband's, thereby prescribing property rights between spouses and non-suiting their *inter se* contract and tort claims.[109] Late nineteenth-century legal theorizing also contributed to

105. *See supra* notes 17–25 and accompanying text.

106. *See infra* Section II.B.

107. *See infra* Section II.C.

108. *See, e.g.*, Gregory Klass, Convergence by Design: Who Contracts and the Plural Purposes of Contract Law 3 (Nov. 2023) (unpublished manuscript) (on file with the *Iowa Law Review*) ("It is common wisdom among contract scholars that theories of contract law often reflect the type of contractual transaction the theorist imagines as paradigmatic."); *id.* at 4 (arguing that "untheorized assumptions about who parties are and how they transact can affect theoretical claims about contract law's function and optimal design"); *see also id.* at 6 (invoking Carol Rose's "oberv[ation] that theories about what the law is or should be often assume one or another picture of legal subjects . . . the people whom the law is to govern" (citing Rose, *supra* note 22)); *cf.* BERNSTEIN, *supra* note 9, at 25–26 ("Variety in the[] ranks [of common-law decisionmakers] would have generated a very different common law. For example, if children were full persons who could have spoken for themselves, themes of dependency and shared responsibility would have become more overt in its doctrines.").

109. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *442 ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything . . . ."); BERNSTEIN, *supra* note 9, at 94 ("*Commentaries on the Laws of England* as read by American colonists and founders of the Republic became prescription, differing from the description it had been in England, and also . . . plenary in contrast to partial."); HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 118 (2002) (describing dominance of Blackstone's *Commentaries* in U.S. marriage law); *see also* Hasday, *Canon of Family Law*, *supra* note 94, at 845 (describing how, after "[t]he married women's property acts . . . granted wives the right to sue in their own names[,] . . . rais[ing] the specter of interspousal litigation for the first time[,] [c]ourts promptly responded by establishing a common law rule of

the exclusion of spouses' disputes from private law categories by segregating family matters into the new field of "domestic relations."[110] And until the mid- to late twentieth century, property claims between unmarried intimates were forbidden on the basis of their illegal and "meretricious" relationships.[111] With judges mostly relieved of the task of adjudicating intimates' disputes,[112] private law developed primarily to govern more arm's-length interactions.

Because it evolved to capture thinner forms of cooperation, contract law often fails to recognize and protect more complex, socially embedded forms of cooperation. For historically dependent reasons, this body of law operates according to overly simplified models of human behavior and concerns itself solely with the class of cases in which the reasons for judges to scrutinize parties' bargains are the least pressing. The *Marvin* case illustrates these failings. Per *Marvin*, the law's goal should not be to "treat nonmarital partners as putatively married persons," but rather to "treat them . . . as . . . any other unmarried persons."[113] But unmarried partners are *not* "any other unmarried persons."[114] Whereas the gender-based critique condemns courts for seeing *too much* intimacy, this structural explanation holds that the law does *not* see *enough* intimacy,[115] understood as the range of cooperative ecosystems that frequently arise in closer relationships.

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interspousal tort immunity and interpreting the married women's property acts to leave that rule undisturbed").

110. *See* Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMANS. 1, 1 (2011) ("Domestic Relations/Family Law are what they are by virtue of their categorical distinction from the law of contract and, more broadly, the law of the market."); *id.* at 2 (describing "the separation of the law of familial intimacy from the law of productive labor"); Laura T. Kessler, *Family Law by the Numbers: The Story that Casebooks Tell*, 62 ARIZ. L. REV. 903, 904–05, 907–08 (2020); *id.* at 907–08 (arguing the separation of "the law of productive labor . . . from the law of the household. . . . crystallized [family relations] into the opposite of contract . . . relationships whose essential ideas are affection, care, duty, and dependency, rather than consent and the equal right that exists between person and person"); *see also* Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876, 1894–97 (2001) (describing classical contract theorists' attempts to consign state-defined obligations to other doctrinal categories). *See generally* Halley, *supra* (tracing evolution of family law through the late nineteenth century).

111. *E.g.*, Marvin v. Marvin, 557 P.2d 106, 112 (Cal. 1976) (in bank) (rejecting older precedent that "contract[s] between nonmarital partners [are] unenforceable" because of the "illicit," "'immoral' character of the relationship" and holding that such "a contract . . . is unenforceable only to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual services" (emphases omitted)).

112. Of course, some litigants did bring claims against intimates, but these were mostly rebuffed. *See generally* Siegel, *supra* note 95 (describing suits and outcomes).

113. *Marvin*, 557 P.2d at 121.

114. *Id.*

115. *See supra* note 100 and accompanying text.

A. THE GENDER-BASED EXPLANATION: RELATIONS OF NO RETURN

According to the gender-based critique, cohabitant claims fail because the law constructs intimate relations as against market relations and designates expectations of return to be reasonable only in the latter.[116] This explanation is most convincing when courts depart from generally applicable private law principles to deny cohabitants' claims. This orientation appears in jurisdictions that are skeptical of family members' contracts or hostile toward unmarried couples' claims as a matter of public policy. In the first instance, although cohabitants are not formally legally related, courts employ gendered relationship-based reasoning derived from marital status law to defeat recovery where a similar exchange between spouses would be deemed without expectation of "market" return.[117] In the second scenario, jurisdictions that reject cohabitants' private law claims on grounds of public policy explicitly enshrine gender-based views of appropriate sexuality, penalizing couples who did not or could not marry by leaving a relationship's losses where they lie.[118] In either case, the outcome reached is inexplicable without recourse to the fact of the litigants' intimacy, as conventionally understood.

By way of illustration, consider two recent cases, one in contracts and one in equity, each issued by a divided state supreme court.[119] These cases are not representative of the universe of litigated cohabitant disputes. Instead, their facts present especially strong claims whose rejection is surprising as a matter of prevailing private law—as cogently noted and contested by the dissenting justices.

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116. *See supra* notes 94–100 and accompanying text.

117. *See, e.g.*, Antognini, *Nonmarital Contracts*, *supra* note 97, at 106–13; Albertina Antognini & Susan Frelich Appleton, *Sexual Agreements*, 99 WASH. U. L. REV. 1807, 1810 (2022) ("Case law . . . refus[es] to recognize as contracts agreements that entail sex in both nonmarital and marital relationships."); *cf.* Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 20 (Ct. App. 1993) (declaring a husband's promise to leave wife property in exchange for her promise to care for him at home void as against public policy).

118. *Compare* Hewitt v. Hewitt, 394 N.E.2d 1204, 1209 (Ill. 1979) ("[J]udicial recognition of mutual property rights between unmarried cohabitants would . . . clearly violate the policy . . . . of strengthening and preserving the integrity of marriage." (citations omitted)), *reaff'd*, Blumenthal v. Brewer, 2016 IL 118781, 69 N.E.3d 834, *and id.* at 1209 (referring to "the naivete we believe involved in the assertion that there are involved in these relationships contracts separate and independent from the sexual activity, and the assumption that those contracts would have been entered into or would continue without that activity"), *with* Watts v. Watts, 405 N.W.2d 303, 311–12 (Wis. 1987) (describing *Hewitt* as "unduly harsh" and noting "that the result of a court's refusal to enforce contract and property rights between unmarried cohabitants is that one party keeps all or most of the assets accumulated during the relationship, while the other party, no more or less 'guilty,' is deprived of property which he or she has helped to accumulate").

119. *See generally* Williams v. Ormsby, 966 N.E.2d 255 (Ohio 2012) (refusing to enforce cohabitants' written contract regarding ownership of real property for lack of consideration); *Blumenthal*, 2016 IL 118781, 69 N.E.3d 834 (rejecting cohabitant's restitution claim).

In the first case, *Williams v. Ormsby*, the Ohio Supreme Court rejected a cohabitant's request to enforce a written contract for lack of consideration.[120] In May 2004, Amber Williams and Frederick Ormsby began cohabiting in the house Williams had received after her prior divorce.[121] After Ormsby paid off the mortgage on the house to the tune of $310,000, Williams quitclaimed the property to him in December 2004.[122] When the parties separated in March 2005, they executed a contract to sell the house and divide the proceeds.[123] The couple then attempted to reconcile, and as part of the process, they signed a second agreement in June 2005 "making themselves 'equal partners' in the . . . house and . . . providing for property disposition in the event that their relationship ended."[124] Williams then moved back into the house with Ormsby, and the two remained a couple until September 2007.[125] After finally parting ways, the two sued each other. Williams sought specific performance of the second contract or damages for its breach, while Ormsby requested, among other remedies, a declaratory judgment that both of the parties' agreements were "invalid for lack of consideration."[126] The trial court found consideration for the first but not the second agreement and therefore determined that Ormsby held exclusive title to the property.[127] The intermediate appellate court upheld both agreements, and Ormsby appealed.[128]

Rejecting the June 2005 agreement's statement that it "was made 'for valuable consideration,'" a majority of the Ohio Supreme Court concluded that "the only consideration offered by [Williams] for the June 2005 agreement was her resumption of a romantic relationship with [Ormsby]."[129] The majority then relied on late-nineteenth-century precedent to establish that "love and affection alone [are not] recognized as consideration for a contract," rendering "the June 2005 document . . . a gratuitous promise by [Ormsby] to give [Williams]

120. *Williams*, 966 N.E.2d at 256 (holding that "merely resuming a romantic relationship . . . with another can[not] serve as consideration for a contract").

121. *Id.* at 257.

122. *Id.*

123. *Id.*; *see also id.* at 260 (summarizing terms of first agreement). Tellingly, the majority consistently described Williams's and Ormsby's actions to commemorate their agreements as "sign[ing] . . . document[s]" or "writing[s]." *Id.* at 257, 259.

124. *Id.* at 257; *see also id.* at 260–61 (summarizing terms of second agreement).

125. *Id.* at 257.

126. *Id.*

127. *Id.*

128. *Id.* at 257–58. On appeal, Ormsby contested the enforceability of the June 2005 agreement only. *Id.* at 259 n.2.

129. *Id.* at 264; *see also id.* at 258 (describing the issue presented as "whether the emotional aspect of resuming a relationship by moving in together can serve as consideration for a contract—separate and apart from the sharing of financial resources and obligations").

an interest in property."[130] Because Williams suffered "no detriment" under the June 2005 agreement, she could not reasonably expect it to be enforced.[131]

The dissenting Justice not only pointed out the consideration which the majority overlooked—"the voiding of the first agreement, which denied to each . . . rights that the first agreement granted"—but also elaborately detailed the differences between the parties' respective rights and obligations under the two agreements.[132] Concluding that "[t]he resolution of this case should be straightforward," the dissent characterized the majority as instead "chas[ing] a red herring ('love and affection') all the way upstream until it reached a dry creek bed."[133]

Why did the Ohio Supreme Court go out of its way to avoid enforcing a written agreement as a matter of law? In addition to the relationship-based reasoning described in Section II.B, the majority's analysis may have also reflected a background orientation skeptical of family members' contracts. Applying the consideration doctrine to non-marital agreements imports a legal rule refusing to permit spouses to contract around state-set marital duties,[134] and that legal rule remained Ohio law during the litigation. Although not mentioned in the opinion, at the time of the case, Ohio was perhaps the only U.S. jurisdiction to prohibit all enforcement of spouses' postnuptial agreements.[135] Thus, the result might have been explained in part by a state public policy particularly inhospitable to postnuptial contracts. If this is true, then the outcome of *Williams v. Ormsby* is deeply ironic: A rule meant to protect cooperation between spouses worked instead to prevent unmarried partners from fairly dividing, according to their lights, the fruits of their nonmarital cooperation.

In the second case, *Blumenthal v. Brewer*, the Supreme Court of Illinois denied a former cohabitant's restitution claim on the basis of a 1979 precedent rejecting property rights between unmarried partners.[136] Dr. Jane Blumenthal

130. *Id.* at 264 (citing Flanders v. Blandy, 12 N.E. 321 (Ohio 1887)).

131. *Id.* at 264–65.

132. *Id.* at 266, 266–67 (Pfeifer, J., dissenting).

133. *Id.* at 266.

134. *See* Silbaugh, *supra* note 41, at 29 ("Before 1970, courts took the position that a couple could not enter into an enforceable agreement that altered the essential legal incidents of marriage.").

135. *See* OHIO REV. CODE § 3103.06 (West 2012) ("A husband and wife, cannot by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation."); *cf.* Bix, *supra* note 48, at 165 ("[A]greements . . . signed by spouses during the marriage. . . . are currently, in principle, enforceable in nearly every state."). Only in December 2022 did the Legislature pass a law to permit postnuptial agreements, which came into effect in March 2023. *See* OHIO REV. CODE ANN. §§ 3103.06–3103.061 (West Supp. 2024). Ohio did and still does permit premarital agreements, but with some stringent safeguards. *See, e.g.*, Fordeley v. Fordeley, 2023-Ohio-261, ¶¶ 16, 18, 207 N.E.3d 105, 111–12 (citing Fletcher v. Fletcher, 1994-Ohio-434, 628 N.E.2d 1343, 1345–46).

136. *See generally* Blumenthal v. Brewer, 2016 IL 118781, 69 N.E.3d 834, *reaff'g* Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979).

and Judge Eileen Brewer had had an almost thirty-year "domestic relationship and raised a family together," but as a same-sex couple were unable to marry.[137] When the parties' relationship ended in 2008, Blumenthal moved out of their jointly owned residence and filed for partition.[138] Brewer counterclaimed, seeking various equitable remedies.[139] The circuit court dismissed Brewer's counterclaims on the ground that the 1979 case, *Hewitt v. Hewitt*, "preclude[d] unmarried cohabitants from bringing claims against one another to enforce mutual property rights where the rights asserted are rooted in a marriage-like relationship between the parties."[140] The intermediate appellate court found for Brewer, but five Justices of the Supreme Court of Illinois voted to affirm the circuit court.[141] The court dispatched four of the suit's five counts on grounds of justiciability,[142] but reached the merits of Brewer's request for "a constructive trust over the annual net earnings or the sale of Blumenthal's share of her medical practice, or in the alternative, restitution of funds that Blumenthal used from the couple's joint account to purchase the medical practice."[143]

This request presented two alternative theories of recovery: either a gains-sharing distribution of property acquired during the relationship,[144] similar to that available to dissociating business partners or divorcing spouses,[145] or a backward-looking private law-style unwinding to place Brewer in the position she would have been in, vis-à-vis Blumenthal's medical practice, absent the parties' relationship.[146] Rather than grappling with the substance of Brewer's first theory of recovery, the court summarily rejected it by interpreting Illinois's medical licensure statutes to prohibit "transferring title and possession of

137. *Id.* ¶ 2, 69 N.E.3d at 839.

138. *Id.* ¶¶ 46, 2, 69 N.E.3d at 848, 839.

139. *Id.* ¶ 9, 69 N.E.3d at 840–41.

140. *Id.* ¶ 1, 69 N.E.3d at 839 (glossing *Hewitt*, 394 N.E.2d 1204).

141. *Id.* ¶¶ 5–6, 69 N.E.3d at 840.

142. Because these claims "all pertained directly to the disposition of the parties' home," their dismissal was not a final judgment reviewable by the appellate court. *Id.* ¶¶ 9, 22–27, 69 N.E.3d at 840, 843–44. Moreover, the claims were rendered moot by the parties' having litigated the "underlying partition action" to completion during the appeal's pendency. *Id.* ¶¶ 9, 36–43, 69 N.E.3d at 840–41, 846–48.

143. *Id.* ¶ 9, 69 N.E.3d at 841.

144. *Id.* ¶ 46, 69 N.E.3d at 848 ("Brewer contends that she allowed Blumenthal to use their joint account for this investment with the reasonable understanding and expectation that she, Brewer, would continue to benefit from the earnings derived from [the medical group].").

145. *See* UNIF. P'SHIP ACT § 701 (UNIF. L. COMM'N 1977); 805 ILL. COMP. STAT. ANN. 206/701 (West 2019) ("[p]urchase of dissociated partner's interest"); *id.* 206/807 ("[s]ettlement of accounts and contributions among partners"); Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. ANN. 5/503 (West 2019) ("[d]isposition of property and debts").

146. *See, e.g.*, Anita Bernstein, *A Feminist Perspective: Private Law as Unjust Enrichment*, *in* OXFORD HANDBOOK, *supra* note 12, at 195, 196–97 ("Private law looks backward rather than forward . . . ."); *id.* at 208 n.66 (noting that private law's principle of compensation is "*restitutio ad integrum*," or restoration to an original condition).

Blumenthal's interest" in her practice to Brewer because she "[wa]s not a licensed medical doctor."[147] Despite the court's dissatisfying reasoning,[148] its refusal to countenance marriage-like property claims between cohabitants was unsurprising in light of both Illinois precedent and the general United States doctrinal consensus against allowing unmarried partners to access spousal remedies.[149]

The Court's rejection of Brewer's alternative theory of restitution was much more surprising. Although two dissenting justices pointed out that the backward-looking restitution claim did not "seek 'marriage-like benefits' . . . or 'marriage-like rights,'"[150] the majority insisted that "*Hewitt* bars . . . relief" even in restitution unless a "claim is . . . independent from the parties' . . . relationship."[151] And because "the purchase of Blumenthal's ownership interest" in her medical practice "was made for the family's financial security," the majority concluded that Brewer's restitution claim lacked "an independent economic basis apart from the parties' relationship."[152] Unlike "an investment between business partners" or an "arm's-length bargain envisioned by traditional contract principles," "an investment for the family" continues to receive no protection under Illinois law unless those making the investment are married to one another.[153]

In each of the above cases, the majority appears to have gone out of its way to deny relief to an unmarried partner. Feminist and family law scholars read these cases as demonstrating the continuing strength of separate spheres ideology in the law; intimates' exchanges, unlike market-based exchanges, enjoy limited private law protection. I concur that ideas of gender and family play strong roles in these cases but note that the jurisdictions exhibiting these approaches are doctrinal outliers.[154] In the majority of jurisdictions without

147. *Blumenthal*, ¶¶ 48–49, 69 N.E.3d at 848–49 (relying on the Illinois Medical Corporation Act and the Medical Practice Act of 1987 to bar Brewer's claim).

148. The argument from these statutes seems to purposefully dodge the main thrust of Blumenthal's request, given that Illinois courts routinely classify medical practices as marital property subject to distribution on divorce. *See, e.g.*, *In re* Marriage of Lee, 615 N.E.2d 1314, 1321 (Ill. App. Ct. 1993) (discussing valuation of medical practice); *In re* Marriage of Charles, 672 N.E.2d 57, 62 (Ill. App. Ct. 1996) (holding that, given likelihood that doctor–husband would be awarded medical practice, "[t]he trial court should award [wife] other marital property as an offset or order [husband] to make payments to her"). Forthright reliance on *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979), would have been conceptually clearer and more defensible.

149. *See Hewitt*, 394 N.E.2d at 1211; *supra* note 86 and accompanying text.

150. *Blumenthal*, ¶¶ 92, 114, 69 N.E.3d at 860, 866 (Theis & Burke, JJ., concurring in part and dissenting in part); *see also id.* ¶ 120, 69 N.E.3d at 868 ("Brewer has not employed an implied contract theory to achieve the same result that she would obtain under section 503 of the Marriage and Dissolution of Marriage Act . . . . She has employed an equitable theory to achieve a just result.") (Theis & Burke, JJ., dissenting upon denial of reh'g).

151. *Id.* ¶ 73, 69 N.E.3d at 856 (majority opinion).

152. *Id.* ¶¶ 72–73, 69 N.E.3d at 855–56.

153. *Id.* ¶ 71, 69 N.E.3d at 855; *see supra* note 118 and accompanying text.

154. The *Blumenthal* dissent specifically invoked the *Restatement (Third) of Restitution and Unjust Enrichment*'s inclusion of "a new section," section 28(1), "that provides former domestic partners with an avenue 'to prevent unjust enrichment upon the dissolution of the relationship'"

precedent overtly hostile to cohabitant claims, I think that decision-makers aren't so much consciously driven by gender ideology as they are hampered by inadequate doctrine. For judges in these states, the law of voluntary obligations provides little in the way of conceptual resources to understand, let alone fairly adjudicate, cohabitants' property disputes. The next Sections unpack this claim.

B. Structure, Part I: Reducing Cooperation to Altruism

Scholars of nonmarital relationships correctly identify an important avenue through which cohabitant claims fail: that judges adjudicating unmarried partners' property disputes falsely distinguish between market "labor" and family "love," with only the former grounding private law recovery.[155] However, the gender-based critique devotes little systematic attention to what the challenged market-family dichotomy itself obfuscates: the wide gap between self-interested, discrete bargained-for exchanges and selfless giving, the range of complex and complexly motivated interactions that I call cooperation.[156] Indeed, the end poles of "market exchange" and "family altruism" are best understood as ideal types, useful heuristics that rarely manifest themselves perfectly in reality.[157] With greater attention focused on the range of cooperative behavior between the ideal types, it becomes clear that what gets explained in terms of gendered ideology is in most cases better and more fully understood as a conceptual deficit in the private law of voluntary obligations. Because contract law lacks adequate behavioral models to explain intimates' cooperation, it cannot conceive of, let alone vindicate, reasonable expectations between intimates. Instead, it reduces intimates' cooperation to altruism, which does not give rise to legal obligation.

As scholars have long noted, courts hearing cohabitant claims tend to measure the parties' interactions against one of two behavioral paradigms: the self-interested calculation associated with market actors, or the selflessness identified with the family. As Anthony Kronman puts it, "Contract law is centrally concerned with voluntary exchange, and . . . our law of contracts tends to treat the impersonal market transaction as the paradigm of all exchange

to argue that "Illinois is a clear outlier on this issue." *Id.* ¶¶ 105–06, 69 N.E.3d at 864 (Theis & Burke, JJ., concurring in part and dissenting in part) (quoting RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28(1) (AM. L. INST. 2011)). That argument did not, however, sway the majority from their position that it is "the duty of the legislature to set policy in the area of domestic relations." *Id.* ¶ 77, 69 N.E.3d at 857 (majority opinion); *cf. supra* note 135 and accompanying text (describing Ohio's outlier position on postnuptial agreements).

155. *See supra* notes 94–99 and accompanying text.

156. *See supra* notes 17–25 and accompanying text.

157. *See, e.g.*, Hasday, *Intimacy and Economic Exchange*, *supra* note 100, at 497 (describing "the social exchange of economic assets between intimates" as "what one could term *structured altruism*," in that giving "is neither entirely spontaneous nor entirely selfless"); Kaiponanea T. Matsumura, *Unifying Status and Contract*, 56 U.C. DAVIS L. REV. 1571, 1597–99 (2023) (showing how many market exchanges fail to approximate the impersonal market transaction).

relationships."[158] But because intimates' behavior rarely approximates "the impersonal market transaction"[159]—indeed, the behavioral norms of close relationships often prevent intimates from explicitly defining their respective rights and responsibilities[160]—judges tend to apply the family-based, altruistic model, under which no private law obligations arise.[161] Indeed, several of the doctrinal hurdles limiting unmarried partners' claims reflect private law's lack of frameworks for understanding behavior in intimate relationships. This phenomenon plays out most obviously when cohabitants make contract-based claims, though it also inflects requests for equitable remedies.

Consider again the doctrine of consideration, which prevented enforcement of the written agreement in *Williams v. Ormsby*.[162] Based on an exhaustive study of litigated cases,[163] Albertina Antognini argues that when courts invoke "lack of consideration" to refuse to enforce alleged express contracts between cohabitants, they "reason[] . . . that the contract . . . was based on love or affection and therefore unenforceable[,] or that the services rendered inhered in the relationship itself and are therefore insufficient to impose any obligations on the other party."[164] Both approaches incorporate assumptions about behavior in intimate relationships—in particular, that closely related parties give to one another without expectation of return. The first line of reasoning takes the totality of exchanges between intimates to represent a series of gifts as a matter of fact, while the second reduces intimates' interactions to gifts as a matter of law.[165]

158. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 797 (1983); *cf.* Dalton, *supra* note 9, at 1098 (noting the "common presumption that agreements between intimates are not contractual"); Ellman, *supra* note 21, at 1374 ("Contractual obligations are discrete while social obligations are embedded in a larger relationship on which they depend for their existence and meaning.").

159. Kronman, *supra* note 158, at 797.

160. Ellman, *supra* note 21, at 1367 ("The main defect with contract as the conceptual underpinning for claims between intimate partners is that couples do not in fact think of their relationship in contract terms.").

161. *See supra* note 97 and accompanying text.

162. Williams v. Ormsby, 966 N.E.2d 255, 264–65 (Ohio 2012); *supra* notes 129–33 and accompanying text.

163. Antognini, *Nonmarital Contracts*, *supra* note 97, at 76 n.34 (explaining methodology); *id.* at 154–73 (appendices listing and sorting cases).

164. *Id.* at 104. Courts also refuse to enforce agreements on public policy grounds by "determining that the contract was based on sex and therefore illicit." *Id.*

165. *See, e.g.*, *id.* at 113 (describing "the presumption that services rendered are gratuitous and therefore not the subject of an exchange"); Joslin, *Double Bind*, *supra* note 87, at 578 ("As between strangers, the law presumes that services provided were done so with an expectation of compensation. But the reverse presumption applies to the exchange of domestic caretaking for support as between people who are family members. These services—unlike all other services—are presumed to have been provided gratuitously."); *see also* Siegel, *supra* note 95, at 2131 (critiquing "judicially enforced 'altruism'").

For an example that intertwines both the fact-based and law-based lines of reasoning, consider *Smith v. Carr*.[166] In that case, a California federal district judge found that "providing 'attention, availability, domestic services, companionship, comfort, love, and emotional support'" was insufficient to "constitute . . . lawful consideration" because such "services are 'not normally compensated and are inextricably intertwined with the sexual relationship.'"[167] Viewed through a market-exchange mindset, services that do not command economic remuneration could only be gifts offered out of selflessness. And the description—and dismissal—of services as "inextricably intertwined" with a relationship suggests that, while courts may be able to recognize complex patterns of relational behavior, current doctrine allows them to sidestep the work of assessing intimates' cooperative ecosystems by ignoring coordination that doesn't look like bargained-for exchange.[168]

Indeed, when courts encounter intimates' complex and complexly motivated sharing behavior, they have two doctrinal options: identify a compensable contractual exchange or analyze the case under private law's only alternative property-transfer paradigm, the altruistic gift. In both *Williams v. Ormsby* and *Smith v. Carr*, the courts perceived the intimate partners' interactions as diverging from contract law's "paradigm" of "the impersonal market transaction" and its bargained-for exchange,[169] and therefore categorized them as non-contractual. There are good reasons to distinguish between discrete market exchanges and patterns of intimate cooperation,[170] but because the law of voluntary obligations has rules to govern only the first, a finding of "no contract" ends the court's analysis. Without frameworks to make sense of relations of reciprocity, judges lack guidelines to assess and vindicate intimates' reasonable expectations.

Restitution-based analysis also relies upon examination and overly simplified classification of unmarried partners' behavior. For example, unjust enrichment traditionally will not compensate a claimant for voluntarily transferred benefits,[171]

166. *See generally* Smith v. Carr, No. cv 12-3251, 2012 WL 3962904 (C.D. Cal. Sept. 10, 2012) (involving express and implied contract claims).

167. *Id.* at *4; *id.* ("Without more, plaintiff's express contract claim must fail for lack of consideration, as plaintiff's alleged consideration is inextricably intertwined with . . . meretricious consideration.").

168. *Id.* ("[P]laintiff has not alleged she performed services *in exchange for* defendant's express promises apart from the interactions typical of every romantic relationship.").

169. Kronman, *supra* note 158, at 797; *see* Williams v. Ormsby, 966 N.E.2d 255, 264–65 (Ohio 2012); *Carr*, 2012 WL 3962904, at *4–6.

170. *Cf.* Ellman, *supra* note 21, at 1375 (opining that "the old rule . . . that services rendered in the course of a nonmarital 'meretricious' relationship are presumed to have been provided gratuitously" is "probably correct as a matter of contract law" because "[m]utual gifting arising from mutual concern and affection is not the same as a bargained-for exchange").

171. Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 712 (2006) (describing as a "traditional constraint[] on restitution[] the principle that restitution is not available for recovery of voluntary transfers").

and this rule bars recovery when judges view cohabitant interactions as Emily Sherwin does:

> Most transfers of property or services from one cohabitant to another are consensual acts of generosity, performed with no expectation of reimbursement. They are voluntary transactions, free from fraud or mistake (apart from mistaken assumptions about the future course of the relationship, which provide no ground for relief). They are, in other words, valid gifts.[172]

This analysis mirrors the contract analysis: The only two cognizable options for classifying a voluntary transfer of property are as one prong of a bargained-for exchange, *i.e.*, one side's performance of a contract, or an altruistic gift. And this position, too, assumes that the voluntary transfers taking place within an intimate relationship are gratuitous, given without expectation of return, and that private law therefore need not concern itself with the resulting resource distribution when the relationship breaks down.[173] Again, the law of voluntary obligations fails to recognize cooperation; intimate partners' most "mistaken assumptions" are about the law's ability to disentangle their joint projects when cooperation breaks down.[174]

In applying the doctrine of consideration and insisting that restitution does not unwind voluntary transfers, courts tend to characterize unmarried partners' behavior as not selfishly motivated. And because private law lacks a paradigm that explains intimates' cooperative interactions and justifies their legal protection, once courts reach the not-selfish conclusion, they have no conceptual alternative but to interpret the behavior in question as selfless.[175] Selfless behavior is by definition without "expectation of reimbursement,"[176] so there is no legal ground for courts to step in to transfer property from a title holder to that person's former intimate partner. A finding of altruism, then, means that judges will leave a relationship's gains and losses where they lie. With courts' behavioral classifications determining the outcomes of

172. *Id.* at 724.

173. *Cf. id.* at 712 (arguing that "courts should resist the temptation to treat unjust enrichment as an open-ended decisional principle that authorizes them to give relief against behavior that strikes them as unfair"); *id.* at 720 ("It may be that disappointed cohabitants should have other avenues for relief, such as status-based claims to a division of assets.").

174. *Id.* at 724; *cf.* Marvin v. Marvin, 557 P.2d 106, 121 (Cal. 1976) (in bank) ("[P]arties to a nonmarital relationship . . . . may well expect that . . . the courts will fairly apportion property accumulated through mutual effort.").

175. *Cf.* Dalton, *supra* note 9, at 1105 (noting that "the traditional conclusion that the woman's domestic services cannot provide consideration for the promises made to her by the man . . . . is usually linked to the idea that the relationship itself is not one the parties see as having a legal aspect," and paired with the "explanation . . . that the woman did not act in expectation of gain, but rather out of affection, or that she intended her action as a gift").

176. Sherwin, *supra* note 171, at 724.

intimates' property disputes,[177] private law's provision of only an abbreviated set of frameworks for understanding and interpreting human behavior dooms the majority of cohabitant claims.

Thus far, my missing-behavioral-paradigm account is compatible with longstanding critiques of the impact of separate-spheres ideology on doctrinal development.[178] Feminists and family law scholars are right that the treatment of cohabitant claims is (at least in part) a product of the history of family regulation, which is heavily gendered.[179] I argue, however, that the impact of history must also be understood in terms of foreclosed alternatives, of doctrinal roads not taken.[180] For contingent reasons, the law of voluntary obligations has evolved to protect cooperation in market settings, but not between parties in closer social relationships. As a result, private law structures human interactions as a selfish/selfless binary and lacks a robust framework for deciphering the extensive behavioral middle ground between these two poles: what I call cooperation, those complex and complexly motivated ecosystems of connected and reciprocal interactions that frequently arise in closer social relationships.[181] And without such a paradigm, private law cannot field a legal theory that recognizes and protects intimates' interactions for joint benefit—leaving even sympathetic judges adjudicating unmarried partners' claims little choice but to code their cooperation as altruistic, and thus not of legal concern.

C. Structure, Part II: Elevating Private Ordering

Cohabitant claims also fail for a second and related structural reason: Judges are reluctant to impose property-related obligations unless they're thoroughly convinced that these obligations arise from the parties' bargains, as opposed to collective norms. Indeed, unmarried partners' claims consistently founder against the view that private law obligations regarding property must

177. *Cf.* Dalton, *supra* note 9, at 1110 ("[A]ttitudes toward . . . relationship . . . . influence how judges frame rule-talk and policy-talk; in a world of indeterminacy they provide one more set of variables that may persuade a judge to decide a case one way or another, albeit in ways we cannot predict with any certainty."); Antognini, *Nonmarital Contracts*, *supra* note 97, at 79 ("[T]he right to contract more often than not depends on the court's judgment of the relationship at stake, rather than on any inviolable principle of contract law.").

178. *See, e.g.*, *supra* notes 94–99 and accompanying text; Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMANS. 189, 189–91 (2011).

179. *Cf.* Antognini, *Nonmarital Contracts*, *supra* note 97, at 94 (describing coverture as "a, if not *the*, foundational model for understanding the instantiation of separate spheres across family relationships"); Hasday, *Canon of Family Law*, *supra* note 94, at 844 (noting "substantial evidence within family law to support a . . . story of the persistence of coverture principles and rules"); *cf.* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–87 (1996) (describing how status relations are modernized through a process of "preservation-through-transformation").

180. Robert Frost, *The Road Not Taken*, *in* THE POETRY OF ROBERT FROST: THE COLLECTED POEMS 105, 105 (Edward Connery Lathem ed., 1979).

181. *See supra* notes 17–25 and accompanying text; *infra* notes 215–18.

be self-determined.[182] Courts hearing cohabitant cases worry about contradicting the partners' intentions and understandings, at the same time that they bemoan the difficulty of developing principles to collectively determine what's "fair" in these situations.[183] The law of voluntary obligations' aversion to public values displacing private ordering makes courts hesitant to impose duties on unmarried partners by virtue of their cooperative behavior—despite the parties' potentially justified expectations that they will "deal fairly with each other."[184]

Like private law's difficulty perceiving intimate cooperation, this orientation, too, is traceable to historical contingency. The resistance to collective concerns shaping voluntary obligations first appeared in late nineteenth-century efforts to excise the law of husband and wife from contract law, defining the former as status-based "domestic relations" to render the latter field consistent with will-based theories of obligation.[185] By banishing relations in which society's interests are undeniable to other legal fields, the classical contract theorists doubled down on the arm's length, discrete exchange paradigm, under which the public's interests are promoted by enforcing contracting parties' bargains.[186] And here, private law's two structural deficits reinforce one another: Because of the lack of doctrinal frameworks to govern intimates' interactions, courts have had little reason to reconsider the foundational assumption that private ordering furthers public interests, or to revisit their celebration of parties' bargains, in the context of disputes between intimates. As a result, the law of

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182. *See infra* notes 187–201 and accompanying text.

183. *See, e.g.*, Joslin, *Autonomy*, *supra* note 86, at 932–33 (describing cases in which courts seek precise contractual intent); *cf.* Merrill, *supra* note 12, at 578 (describing public law, not private law, as the "mechanism of . . . promot[ing] compliance with collectively determined norms"); Sherwin, *supra* note 171, at 712 (arguing that "courts should resist the temptation to treat unjust enrichment as an open-ended decisional principle that authorizes them to give relief against behavior that strikes them as unfair").

184. Marvin v. Marvin, 557 P.2d 106, 121 (Cal. 1976) (in bank) ("[P]arties to a nonmarital relationship . . . . may well expect that property will be divided in accord with the parties' own tacit understanding and that in the absence of such understanding the courts will fairly apportion property accumulated through mutual effort.").

185. *See* Halley, *supra* note 110, at 2–3 (describing "transformation," "with the rise of classical legal thought," after which "[c]ontract law housed the will of the parties, while the law of marriage, the law of quasi-contract . . . and tort provided the legal channels for the will of the state"); Hila Keren, *Considering Affective Consideration*, 40 GOLDEN GATE U. L. REV. 165, 181 (2010) (noting "the major effort made by classical contract theorists . . . to connect their (new) field with the market world and distance it from the domestic arena"); Kreitner, *supra* note 110, at 1896 ("[W]hereas contract up until the mid-nineteenth century swept in (perhaps primarily) an entire array of state imposed obligations entered into wholesale by some manifestation of voluntariness, classical theorists reconceived the field as including primarily obligations undertaken by rational agents who promise, and by promising, shape the contents of their own obligations.").

186. *Cf.* Eisenberg, *supra* note 8, at 808 (describing why classical contract law's "rational-actor model . . . . accounts in part for the rule that bargains would not be reviewed for fairness: if actors always act rationally in their own self-interest, then, in the absence of fraud, duress, or the like, all bargains must be fair").

voluntary obligations offers little in the way of guidance for courts asked to distribute the fruits of intimates' cooperative endeavors.

The view that voluntary obligations must be self-determined, and that the court's job is therefore to ensure that only bargained-for exchanges are legally enforced, manifests itself in two main ways in the cohabitant cases. First, many jurisdictions impose across-the-board heightened doctrinal requirements for enforcement of agreements between unmarried partners.[187] This position simultaneously demonstrates—and provides an *ex ante* avenue to remedy—skepticism toward cohabitants' bargains by providing further evidence to judges of the parties' intent to enter into an enforceable agreement.[188] Second, some judges also reject contract claims in individual cases on vagueness or mutual-assent grounds.[189] In these situations, courts declare themselves unable to determine the content of the purported bargain and therefore unwilling to impose legal obligations to which the parties did not assent.

Jurisdictions that are skeptical of cohabitant agreements may require a range of additional formalities in order for unmarried partners to establish an actionable bargain. A number of states insist that cohabitants' contracts must be express,[190] or even in writing,[191] to be enforceable, out of fear that courts

187. For example, Courtney Joslin has shown that courts seek heightened indicia of unmarried partners' intent to take on legal obligations toward one another, an extraordinary doctrinal requirement that defeats most cohabitant claims. Joslin, *Double Bind*, *supra* note 87, at 588–614; *id.* at 579–80 ("Nonmarital partners are denied relief for their family-like bargains because the law subjects *these claims and only these claims* to heightened formality requirements, beyond those imposed on sophisticated business players.").

188. *Cf.* Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–04 (1941) (describing the evidentiary, cautionary, and channeling functions of legal formalities); Strauss, *supra* note 25, at 1278 (ascribing this doctrinal position to "the same pragmatic concerns that underlie statutes of frauds, such as the ease of false allegations, the lengthiness of court battles, and the difficulty of determining precise terms").

189. Albertina Antognini has shown that even when cohabitants have executed written agreements or plead the existence of express contracts, judges often find reasons to invalidate their agreements. Antognini, *Nonmarital Contracts*, *supra* note 97, at 78 ("[C]ourts decline to enforce express contracts in practice," instead "finding that there was no consideration, or that the agreement was one-sided, or that the terms of the contract were vague.").

190. Morone v. Morone, 413 N.E.2d 1154, 1155 (N.Y. 1980).

191. MINN. STAT. §§ 513.075, 513.076 (2025); N.J. STAT. ANN. § 25:1–5(h) (West 2022) (requiring that cohabitants executing a written agreement must both procure advice of counsel), *overruled by* Moynihan v. Lynch, 269 A.3d 435, 452 (N.J. 2022) (noting that, "among all the category of private agreements covered by the Statute of Frauds, only palimony agreements require attorney review," and striking down section 25:1–5(h)'s "attorney-review requirement" for violating substantive due process); TEXAS FAM. CODE ANN. § 1.108 (West 2006); Posik v. Layton, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997) (applying the Statute of Frauds requirement "that contracts made upon consideration of marriage . . . be in writing" to "non-marital, nuptial-like agreements"). North Dakota announced, and then retreated from, a similar rule. *Compare* Kohler v. Flynn, 493 N.W.2d 647, 649 (N.D. 1992) ("If live-in companions intend to share property, they should express that intention in writing."), *with* McKechnie v. Berg, 2003 ND 136, ¶ 13, 667 N.W.2d 628, 632 (stating that "joint bank accounts constitute writings evidencing intent").

asked to recognize implied-in-fact contracts may improperly substitute their own judgment for the parties' intent.[192] The reasoning of *Morone v. Morone*, in which the New York Court of Appeals declined to follow *Marvin* insofar as recognizing implied contracts, is instructive.[193] Describing the pleaded "implied contract" as "conceptually so amorphous as practically to defy equitable enforcement," the Court bemoaned the "great . . . risk of error" attending courts' "attempt[s] . . . to sort out the intentions of the parties and affix jural significance to conduct carried out within an essentially private and generally noncontractual relationship . . . ."[194] Without the "frame of reference" provided by an express agreement, how could a court "ascertain . . . what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid[?]"[195] A dissenting justice in *Marvin* had voiced a similar concern regarding the majority's embrace of equitable remedies, urging that "in the absence of agreement, we should stop and consider the ramifications before creating economic obligations which may . . . contravene the intention of the parties."[196] These jurisdictions reject less-than-explicit bargains in the name of ensuring that any obligations enforced are indeed the product of the parties' intent. But in their eagerness to respect individual prerogative, these jurisdictions "depart[] from mainstream contract doctrine, which takes a more permissive view of contract enforcement."[197] For jurisdictions imposing such heightened contracting requirements on unmarried partners, however, only broad prophylactic rules can adequately ensure that the obligations that courts enforce are truly voluntary.

Solicitude for parties' ability to determine their own obligations also appears when courts reject express contract claims in individual cases on grounds of vagueness or lack of mutual assent. Consider the argument of the dissenting judges in *Morone*, who would have affirmed dismissal of the complaint because even "the express agreement alleged [was] too vague and indefinite to be enforced."[198] These judges found the man's alleged promise to "support, maintain and provide for" the woman "in accordance with his earning capacity" too "nebulous and indeterminate . . . to describe what it is to which the parties

192. *Cf.* Dalton, *supra* note 9, at 1001, 1011 (describing "prevailing position" under which implied-in-law or quasi-contracts "are not contracts at all, but constitute instead an exceptional imposition of obligation by the state in order to prevent unjust enrichment"—all because they "rel[y] on social norms to create a public obligation," and in this way "deviat[e] from contract doctrine's focus on the facilitation of private intent").

193. *Morone*, 413 N.E.2d at 1154–55 (unmarried couples' express contracts are enforceable).

194. *Id.* at 1154–55, 1157.

195. *Id.* at 1157.

196. Marvin v. Marvin, 557 P.2d 106, 123–24 (Cal. 1976) (in bank) (Clark, J., concurring and dissenting in part).

197. Matsumura, *supra* note 20, at 1020–21.

198. *Morone*, 413 N.E.2d at 1158 (Jones, J., dissenting).

are agreeing."[199] As a result, "the promise . . . [ran] afoul of the basic premise of contract law . . . 'that an agreement in order to be binding must be sufficiently definite to enable a court to give it an exact meaning.'"[200] When judges cannot pin down to their satisfaction the contours of an alleged agreement, they cannot be certain whether the parties intended to be bound and to what. And because parties in intimate relationships rarely spell out the terms of their cooperation[201]—at least in ways that the law of voluntary obligations can recognize—the search for such a definite intention will often fail in the cohabitant context.

In requiring heightened formalities and rejecting alleged agreements on grounds of vagueness or lack of mutual assent, legislatures and judges express doubt that unmarried partners had the right intent to take on legal obligations toward one another. As feminist and family law scholars have recognized, this skepticism may owe in part to the perception that exchanges between intimates are, per the *Morone* court's words, "generally noncontractual."[202] However, the perception that an exchange is *not* contractual necessarily incorporates assumptions regarding what kind of exchange *is* contractual, that is, capable of creating legal obligations. These background assumptions include not only the selfish/selfless behavioral models described above,[203] but also the theoretical construction of contract law as a framework through which agents may create voluntary obligations.[204] Indeed, the statutory and case law of cohabitants manifest a particularly demanding model of voluntary obligation: Not only must the *imposition* of an obligation be based on the obligor's intent,[205] but that intent must also dictate the *content* of the obligation.[206] This strong resistance toward state-set content for voluntary obligations reflects, at least in part,

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199. *Id.*

200. *Id.* at 1158–59 (quoting 1 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 37 (3d ed. 1957)); *see also* Soderholm v. Kosty, 676 N.Y.S.2d 850, 852 (Just. Ct. 1998) ("Basic contract law requires that a contract spell out a meaningful exchange of promises, clear in their intent and manner of execution. It is not for courts to fashion a contract where the parties have neglected to do so themselves."); *id.* ("[A]t the time of the expenditures, it was not at all clear or unequivocal that the [cohabiting] parties had a 'meeting of the minds' as to restitution.").

201. *Cf.* Ellman, *supra* note 21, at 1367 (arguing that "intimate partners . . . do not in fact think of their relationship in contract terms").

202. *Morone*, 413 N.E.2d at 1157; *see, e.g.*, *supra* note 158 and accompanying text.

203. *See supra* Section II.B.

204. *See, e.g.*, Bagchi, *supra* note 6, at 435 ("Most theories of contract attach great significance to the fact that parties entered the agreement voluntarily."); *supra* notes 6–9, 109–13 and accompanying text.

205. *See, e.g.*, Michael G. Pratt, *Disclaimers of Contractual Liability and Voluntary Obligations*, 51 OSGOODE HALL L.J. 767, 770 (2014) ("What distinguishes an obligation as voluntary is that it obtains only if the obligor intends to acquire it.").

206. *See generally* Stolzenberg, *Nonconsensual Family Obligations*, *supra* note 61 (identifying and critiquing this view in family law).

"classical" contract "theorists['] reconce[ption of] the field as including primarily obligations undertaken by rational agents who promise, and by promising, shape the contents of their own obligations."[207] Thus the second hallmark of the cohabitant cases—courts' extreme hesitation to exceed the boundaries of the parties' intent, and thereby to impose obligations that are involuntary—also represents a structural feature of today's law of voluntary obligations.

* * *

The ways in which cohabitant claims fail reveal deficiencies in the law of voluntary obligations. Courts adjudicating cohabitant cases invoke doctrines like consideration[208] and public policy,[209] interpret voluntary transfers as gifts,[210] or impose heightened doctrinal requirements[211] because they lack the conceptual and doctrinal resources to recognize and protect intimates' cooperation. Without a paradigm to make sense of unmarried partners' complex and complexly motivated interactions, legal decision-makers cannot recognize their conduct as creating mutual and joint benefit. Instead, judges tend to categorize interactions that depart from the classical contract paradigm of arm's-length, discrete exchanges as altruistic giving, causing them to classify cohabitants' requests for post-relationship relief as legally unjustified. Moreover, intimates' behavioral deviation from the market-exchange paradigm makes lawmakers and adjudicators, if anything, *more* reluctant to impose private law-based obligations on them. Not only are jurisdictions and individual judges hesitant to enforce property-related duties to which intimates did not clearly and explicitly assent. The predominance of the bargain-based archetype also means that even when judges are willing to move beyond the search for narrow contractual intent, little law exists to guide them in their analysis of unmarried partners' suits.

This lack persists because the conceptual deficits of cohabitant law are self-perpetuating. Under the assumption that parties interact at arm's length, each pursuing and defending their own interests, the agreements they negotiate should be welfare-enhancing on both sides.[212] As a result, enforcing their

207. Kreitner, *supra* note 110, at 1896; *id.* (noting that "contract up until the mid-nineteenth century swept in (perhaps primarily) an entire array of state imposed obligations entered into wholesale by some manifestation of voluntariness").

208. *See, e.g.*, Williams v. Ormsby, 966 N.E.2d 255 (Ohio 2012); *supra* notes 121–33 and accompanying text.

209. *See, e.g.*, Blumenthal v. Brewer, 2016 IL 118781, 69 N.E.3d 834; *supra* notes 136–53 and accompanying text.

210. *See supra* notes 169–77 and accompanying text (describing how courts reduce intimate interactions to gift-giving).

211. *See supra* notes 189–97 and accompanying text.

212. *Cf., e.g.*, Eisenberg, *supra* note 8, at 808 ("[I]f actors always act rationally in their own self-interest, then, in the absence of fraud, duress, or the like, all bargains must be fair."). *But see* Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1215 (1991) (clarifying that this assumption holds ex ante).

bargains should promote some important public interests—for example, individual autonomy and stable systems of exchange—without too negatively affecting others.[213] A law of arm's-length actors creates conveniently little gap between supporting private ordering and furthering public interests, meaning that courts seldom confront the tensions that arise when bargains aren't mutually welfare-enhancing, or may undermine other important social concerns, or are difficult to isolate from longer and more socially embedded courses of conduct. And courts that rarely engage with these harder questions are unlikely to develop a jurisprudence capable of resolving them. The result is that justice in the cohabitant cases continues to be a matter of accident, rather than design.

III. TOWARD A PRIVATE LAW OF INTIMATES' OBLIGATIONS

The structural explanation of cohabitant disputes highlights the cases' importance to the whole of private law and private law theory. The law of voluntary obligations lacks adequate behavioral models to explain and sufficient doctrinal resources to govern closer-than-arm's-length interactions. This inability to perceive and protect intimates' cooperation creates normative problems in the cohabitant cases and beyond. Not only do unmarried partners lack predictable recourse to untangle their joint endeavors. Decision-makers adjudicating disputes between other cooperators—including family members, friends, close associates, and parties in relations of trust—may also face analogous difficulties in applying doctrine ill-suited to the cases at hand.

To remedy the structural deficits identified here, scholars and legal decision-makers should devote deeper attention to mutually and collectively beneficial cooperation between intimates. Doing so requires adopting a fuller view of human behavior and developing doctrine commensurate with that understanding. To illustrate, I explore what this might look like in the cohabitant context, proposing a few doctrinal approaches for how judges might seek to determine the extent of unmarried partners' cooperation and to fairly distribute its attendant benefits and burdens. I then generalize from the cohabitant context, showing how the principles underlying the proposed approaches—the empirical assumption that individuals might cooperate and the normative judgment that cooperation is commendable and should be

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213. *See, e.g.*, Bix, *supra* note 48, at 172; Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933); Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 112, 118 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020) (describing animating principles of liberal contract theory as relational justice, proactive facilitation, and regard for the future self); Robert E. Scott, *A Joint Maximization Theory of Contract and Regulation*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY, *supra*, at 22, 27 (arguing that contract law promotes "personal sovereignty" and "maximizing contractual value, ... subject . . . to the requirements of the principles of justice that govern society as a whole"); David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 982–83 (2021) ("Contracts flourish when the externalities they create—which are inevitable—are acceptable to the public.").

protected—might apply in private law disputes between other intimates. I close with some potential payoffs for private law theory.

A. Protecting Cooperation in the Cohabitant Cases

Revising the law of voluntary obligations to encompass cohabitant relations requires expanding its paradigms of human behavior beyond the selfish/selfless dichotomy and its grounds of liability beyond narrow contractual intent. I have argued that the law should conceptualize (at least some) unmarried partners' behavior in terms of mutually and collectively beneficial cooperation. When unmarried partners' relationships are understood in this way, the law's responsibility to fairly unwind these socially valuable joint ventures—even when the parties did not explicitly intend to incur obligations toward one another—becomes clear.

As explained above, private law's oversimplified conception of human behavior limits its ability to fairly adjudicate unmarried partners' property disputes.[214] Generally speaking, intimates do not exchange a series of selfless, purely other-promoting gifts, nor do they bargain like arm's-length market actors.[215] Instead, intimates' interactions are best understood as *cooperative*. Unmarried partners may exchange or share their assets and labor because they expect to achieve reciprocity, now or over time.[216] They may act to further the welfare of the community that the relationship constitutes, or because their intimate's success is intertwined with their own.[217] All of these patterns of behavior are forms of cooperation. That is, partners may act to benefit not only themselves individually or their partner solely, but also to (hopefully) build a joint surplus in which the partners share, both individually and together.[218]

The cooperative paradigm departs from both the selfish and the selfless ideal types and therefore calls for a different legal approach (or approaches) to intimates' disputes over property. Market actors are expected to maximize their own outcomes and protect their own interests; on these assumptions, the law takes a light-touch approach, generally deferring to and enforcing

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214. *See supra* Section II.B.

215. *See* Hasday, *Intimacy and Economic Exchange*, *supra* note 100, at 497 (describing "the social exchange of economic assets between intimates" as "what one could term *structured altruism*," in that giving "is neither entirely spontaneous nor entirely selfless"); Stolzenberg, *Properties of Intimacy*, *supra* note 17, at 676 (arguing that "family relationships . . . are created and reinforced through the sharing of resources"). Indeed, as feminist and family law scholars have long argued, the altruism paradigm is a bad fit even for exchanges between legally recognized family members (spouses, parents and children).

216. *See supra* note 25 and accompanying text.

217. This is not necessarily a self-effacing identification of another's success with one's own. Rather, it may be identifying one's partner's success as simultaneously the partner's success, "our" success, and one's own success.

218. Again, among cohabitants, the fair division of debts accrued in support of the joint project may be the more pressing question. *See supra* note 55 and accompanying text.

individuals' private arrangements of their affairs. Altruists give to others without expectation of return and therefore have no interest requiring the law's vindication. Not all cohabitants cooperate,[219] but those who do—especially those engaged in thick, marriage-like cooperation[220]—are undertaking joint ventures that are beneficial to themselves and to society, and they need and deserve rules of fair play to support their cooperation.[221] These rules of fair play should include doctrinal tools not only to fairly distribute that cooperations' benefits and burdens when relationships end, but also to further the kinds of concerns characteristic of tort and equity: providing redress for harm, protecting those in relations of trust, and preventing exploitation.[222] To achieve all these disparate goals, it's likely that multiple doctrines across the different fields of private law writ large will be necessary.

I offer some preliminary substantive thoughts below for purposes of beginning the discussion. I am somewhat agnostic about the precise forms that doctrinal interventions should take because of the potential for overlap in the boundaries of many private law categories.[223] For example, although marital property rights are usually statutory, courts in a few states invoked their inherent equitable powers to develop divorce distribution schemes.[224] Moreover, equitable distribution regimes bear significant resemblance to the structure of remedies available for dissolution of business partnerships and joint ventures.[225] Similarly, legal structures can be created within the bounds of contract law that start to look more like property categories or even status regimes.[226] Indeed, contract scholars often describe marital obligations in contract terms.[227] Whatever doctrinal frameworks are proposed to structure intimates' obligations, they

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219. *Cf.* UNIF. COHABITANTS' ECON. REMEDIES ACT prefatory note, at 1, 2–4 (UNIF. L. COMM'N 2021) (describing the variety of cohabiting relationships).

220. *See, e.g.*, Blumenthal v. Brewer, 2016 IL 118781, ¶ 60, 69 N.E.3d 834, 852 (describing numerous ways in which the parties' relationship "was 'identical in every essential way to that of a married couple'").

221. *See, e.g.*, Stolzenberg, *Properties of Intimacy*, *supra* note 17, at 633 (describing cohabitants as "partners in a . . . cooperative endeavor . . . worthy of the law's respect and support").

222. *See supra* notes 32–38 and accompanying text.

223. *Cf.* Danielle D'Onfro, *Private Law Without Precedent*, 78 VAND. L. REV. 1385, 1394 (2025) ("Drawing clean boundaries around private law's subfields is a fool's errand.").

224. 1 BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 1:3 (3d ed. 2005); *see infra* notes 253–59.

225. *See infra* notes 241–43 and accompanying text.

226. *Cf.* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 121 (2017) (proposing that contract law develop a range of contract types for family relationships); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 775, 777 (2001) (noting "that there is considerable uncertainty about the boundary between" property and contract and analyzing "institutions that lie along [the] property/contract interface" in terms of information costs).

227. *See generally, e.g.*, Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998).

should incorporate both the empirical assumption that at least some intimates cooperate and the normative judgment that such cooperation should be protected. For this reason, unmarried partners' intentions to take on specifically defined obligations toward one another should be relevant if expressed, but not always dispositive of how a relationship's joint surplus should be distributed.[228]

1. Contract Law

The contract law currently applied to cohabitants is maladapted to distribute the fruits of intimates' cooperation.[229] But that does not mean that contract law is inherently incapable of governing intimates' disputes. Ideally, scholars and legal decision-makers would develop more appropriate mandatory and default rules to govern intimates' exchanges, just as they have promulgated such rules to complete (also inevitably incomplete) market-based contracts.[230] Indeed, Hanoch Dagan and Michael Heller have advocated just such an approach to unmarried partners' obligations.[231] In *The Choice Theory of Contracts*, they argue that "cohabitation law should . . . be shaped as a distinct contract type characterized by a different level of spousal commitment."[232] As an example of how the law should distinguish between marital and cohabitant contract types, Dagan and Heller argue that "making cohabitation a viable alternative to marriage" would "justify" states in insisting that marital contracts incorporate "the immutable elements of . . . *ex post* fairness review and the judicial authority to modify based on change of circumstances."[233] If universally adopted, Dagan and Heller's proposed mandatory terms for marital contracts would directly address, as regards spouses, the structural deficits identified in this Article: Giving judges authority to review and modify marital agreements for fairness offers some level of protection for spouses' potentially extensive cooperation, while simultaneously demonstrating the law's willingness to depart from the parties' bargains to vouchsafe society's interests in their relationships.[234] However, Dagan and Heller offer fewer doctrinal specifics regarding co-

228. *Cf.* Stolzenberg, *Nonconsensual Family Obligations*, *supra* note 61, at 682–85 (proposing a pluralist theory of family obligations).

229. *See supra* Part II.

230. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91–95 (1989) (identifying "sources of contractual incompleteness" and proposing "theory of how courts and legislatures should set default rules"); *see also* Matsumura, *supra* note 157, at 1573 (arguing that "courts apply different sets of default and mandatory rules depending on types of contracting relationships, producing outcomes analogous to legal status").

231. *See* DAGAN & HELLER, *supra* note 226, at 121 (arguing that "contract law should support . . . a wider range of intimate family relationships than the old division of married or single").

232. *Id.*

233. *Id.* Per Dagan and Heller, these terms would not be mandatory in cohabitant contracts. *See id.* (arguing that "having an adequate alternative (like cohabitation) to a contract type (like marriage) is an important component of a liberal justification of mandatory rules").

234. *See supra* notes 41–48.

habitation's proper mandatory and default rules, suggesting only that this contract type should "ensure[] restitution if there are significant asymmetric contributions by one cohabiter."[235] Yet even this minimalist account recognizes that "relationships of long-term informal intimacy" may create resource-based entanglement that the law should seek to fairly unwind.[236]

If legal decision-makers are unwilling to develop contract law to govern the full complexity of cohabitant relations,[237] then they should at least faithfully apply extant contract law to nonmarital couples who do engage in formal bargaining. Remember *Williams v. Ormsby*, in which the Ohio Supreme Court (wrongly) refused to enforce a written contract for lack of consideration.[238] Those unmarried couples who negotiate and execute formal agreements establishing their respective obligations are generally sophisticated enough, and acting enough in their own self-interest, that courts should not refuse to enforce those agreements for relationship-based reasons. Here, the focus of reform should be on removing extraordinary barriers to cohabitant contracts,[239] precisely the approach taken by the Uniform Cohabitants' Economic Remedies Act ("UCERA"), promulgated by the Uniform Law Commission in 2021.[240]

2. Partnership Law

The law of partnership or joint venture could also provide a helpful model for governing unmarried partners' cooperation.[241] Courts adjudicating cohabitant claims are being asked to distribute the fruits of the couple's joint efforts, analogous to business partners' recognized claims to share in the surplus of their common endeavor.[242] Partnership law provides default rules about how

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235. *See* DAGAN & HELLER, *supra* note 226, at 132.

236. *Id.*

237. *Cf.* Eisenberg, *supra* note 8, at 820 ("Nonpromissory relationships or obligations should be governed not by contract law—relational or otherwise—but by bodies of law that are tailored to the relevant relationship or obligation, like domestic relations law or tort law.").

238. Williams v. Ormsby, 966 N.E.2d 255, 256 (Ohio 2012).

239. Examples of such barriers include heightened consideration requirements, *e.g.*, *id.* (refusing to enforce cohabitants' contract regarding ownership of real property for lack of consideration), and requiring unmarried partners to consult attorneys, *e.g.*, N.J. STAT. ANN. § 25:1–5(h) (West 2010) (cohabitants executing a written agreement must both procure advice of counsel), *overruled by* Moynihan v. Lynch, 269 A.3d 435, 452 (N.J. 2022) (striking down attorney-review requirement as violation of substantive due process).

240. UNIF. COHABITANTS' ECON. REMEDIES ACT prefatory note, at 1 (UNIF. L. COMM'N 2021). *See generally* Barbara Atwood & Naomi Cahn, *The Uniform Cohabitants' Economic Remedies Act: Codifying and Strengthening Contract and Equity for Nonmarital Partners*, 57 FAM. L.Q. 1, 16–17 (2024) (providing background on the Drafting Committee's "deci[sion] . . . to endorse the principle that cohabitants should be treated the same as others in asserting contractual or equitable claims").

241. *See, e.g.*, Joslin, *Double Bind*, *supra* note 87, at 591–97 (describing partnership and joint venture law and critiquing their limitation to the business context).

242. Indeed, partnership law was the explicit model based on which equitable distribution regimes were developed. UNIF. MARRIAGE & DIVORCE ACT prefatory note, at 4 (UNIF. L. COMM'N

to identify partnership property and how to distribute the partnership's surplus on dissolution that could be instructive in the cohabitant context.[243]

One practical example is Alaska's "domestic partnership" doctrine, under which a "marriage-like relationship between unmarried cohabitants" can give rise to a post-relationship property distribution.[244] The problems, of course, are determining whether partners cohabited in a qualifying relationship and when that relationship began and ended; how to identify domestic partnership property; and what principles of distribution should apply.[245] In Alaska, in the absence of a countervailing statute or governing contract, partnership property is classified and distributed according to the parties' intent.[246] But in contrast to how most courts approach cohabitant disputes, state law permits judges to "infer" the partners' intent "based on evidence" or other law.[247] For example, the fact that "the parties formed a domestic partnership and intended to share in the fruits of their relationship as though married" can "justify[] an equal division of their property,"[248] while the rules of cotenancy may govern the distribution of jointly titled real property.[249] This approach to discerning parties' intent shares the current law's emphasis on voluntariness but is much more flexible about how judges may determine the obligations to which parties assented. Not only does this approach unambiguously invite legal decision-

1973). Many family law scholars have explored analogies to partnership law in the context of spouses. *See, e.g.*, Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349, 353–55 (2007); Rutheford, *supra* note 41, at 541–44; Larry E. Ribstein, *Incorporating the Hendricksons*, 35 WASH. U. J.L. & POL'Y 273, 275–77 (2011); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Disassociation Under No-Fault*, 60 U. CHI. L. REV. 67, 120–30 (1993); *see also* Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 102 (2001) ("A well-developed literature explores analogies between partnership and intimate relationships, suggesting that partnership doctrine offers a way to remedy inequalities within marriage."). Scholars have also applied the partnership model to cohabitant relationships. *See, e.g.*, Ertman, *supra*, at 103–12; *cf.* Joslin, *Double Bind*, *supra* note 87, at 602–03 (criticizing almost uniform refusal of "courts and legislatures . . . to allow for the possibility that the creation and running of a nonmarital family could constitute a joint venture entitling the contributors to share in the venture's success").

243. *Cf.* UNIF. P'SHIP ACT § 204 (UNIF. L. COMM'N 1977) (defining partnership property); Drobac & Page, *supra* note 242, at 387 (noting that "partnership law is, for the most part, a system of default rules," and that "many partnerships do not divide all profits equally"); Joslin, *Double Bind*, *supra* note 87, at 600 ("As with joint 'business' ventures, the distribution of the 'domestic' partnership's assets need not be an equal distribution; it is based on the parties' intentions and their respective contributions.").

244. Tomal v. Anderson, 426 P.3d 915, 925–26 (Alaska 2018).

245. *See, e.g.*, *id.* at 922–23.

246. *Id.* at 923.

247. *Id.*

248. Boulds v. Nielsen, 323 P.3d 58, 64 (Alaska 2014) (quoting Reed v. Parrish, 286 P.3d 1054, 1057 (Alaska 2012)).

249. *See* D.M. v. D.A., 885 P.2d 94, 97 & n.7 (Alaska 1994) (describing domestic partners' disputes as "a particular application of" the "rules of cotenancy").

makers to consider the parties' courses of conduct, rather than searching only for discrete and explicit bargains. It also explicitly assumes that domestic partners may share,[250] and tasks Alaska courts with the duty of identifying that sharing.

3. Remedies

Today, "various restitutionary headings," including "unjust enrichment, resulting trust, constructive trust, *quantum meruit*, and contract implied by law," supply "the main source of contribution-based recovery between ex-cohabitants."[251] In addition to addressing cohabitant claims through unjust enrichment, as courts currently do,[252] judges could also develop an additional remedy of "equitable distribution" for unmarried partners seeking to share in their relationship's joint surplus or apportion joint debts.

How courts resolved spouses' property disputes before the common-law states adopted marital property regimes is instructive for a private law approach to cohabitant claims.[253] Before the advent of equitable distribution statutes in the 1970s and 1980s, title determined spouses' property rights at divorce—a rule that usually accorded the husband the lion's share of the couple's assets.[254] To avoid the injustice of this regime, courts in a few states "used various equitable remedies to recognize a wife's contribution or to prevent the husband's unjust enrichment."[255] And although most jurisdictions established spouses' right to equitable distribution of marital property through legislation, a few

250. Tomal v. Anderson, 426 P.3d 915, 923 (Alaska 2018) (quoting *Boulds*, 323 P.3d at 64 ("[S]imply living together is not sufficient to demonstrate intent to share property as though married, and, moreover, . . . parties who intend to share some property do not presumptively intend to share all property . . . .")).

251. DAGAN, *supra* note 89, at 166–67; *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4(1) (AM. L. INST. 2011) ("Liabilities and remedies within the law of restitution and unjust enrichment may have originated in law, in equity, or in a combination of the two."); Jennifer Nadler, *Unjust Enrichment in Law and Equity*, 74 U. TORONTO L.J. 385, 386 (2024) (describing "the theoretical basis of" unjust enrichment as "deeply contested"); *id.* at 387 ("The law of unjust enrichment comprises two distinct principles – the common law of quasi-contract and the equitable doctrine of unjust enrichment – and each expresses a distinctive conception of what it means for the defendant to be unjustly enriched at the plaintiff's expense.").

252. *Cf.* DAGAN, *supra* note 89, at 167 (describing "the restitutionary regime of balancing significant net surpluses").

253. For the differences between common-law states' and community-property states' approaches to marital property holding, see Stolzenberg, *Properties of Intimacy*, *supra* note 17, at 640–44.

254. *Id.* at 644–45. Title theory continues to govern unmarried partners' property disputes. *Id.* at 639, 643.

255. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 564 (4th ed. 2010) (citing BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 1:3 (3d ed. 2005)); *see also* Ferguson v. Ferguson, 639 So. 2d 921, 926 n.3 (Miss. 1994) (listing South Carolina and Florida).

states did so through common-law decisions of their highest courts.[256] The approach of the Supreme Court of Mississippi is particularly noteworthy. In *Ferguson v. Ferguson*, the court declared that "the broad inherent equity powers of the chancery court . . . give it the authority" to "divi[de] . . . marital assets" and that "[g]eneral equity principles of fairness undergird this authority."[257] Through case law, the state developed a definition of "marital assets" and articulated factors to guide their distribution.[258] Mississippi's common-law approach to spouses' property rights on divorce suggests that we should understand the process of equitable distribution broadly, as a category of equitable remedy, rather than narrowly, as a specifically *marital* property right. Moreover, the developmental history of marital property distribution regimes helps to confirm the place of courts, alongside legislatures, as players in adapting and evolving common-law principles to meet new social exigencies.[259]

Following the structure of equitable distribution but adapting it for unmarried partners, courts might seek first to determine the extent of the parties' cooperation and then to distribute its attendant benefits and burdens according to some to-be-determined principle (or principles).[260] Judges might identify specific assets or liabilities "that concretely furthered an unmarried couple's life together," then distribute that property according to equitable considerations specific to the cohabitant context.[261] For example, contribution might weigh heavier in distributing property between cohabitants than between spouses.[262] The legal rules establishing what property belongs in the "nonmarital estate" and what distribution factors apply would provide an avenue through

256. WEISBERG & APPLETON, *supra* note 255, at 564; *Ferguson*, 639 So. 2d at 927 ("[T]hrough an evolution of case law, this Court has abandoned the title theory method of distribution of marital assets and evolved into an equitable distribution system.").

257. *Ferguson*, 639 So. 2d at 927; *see also* Draper v. Draper, 627 So. 2d 302, 305 (Miss. 1993) ("It is well-established by this Court that the chancery court has the authority to order an equitable division of property that was accumulated through the joint efforts and contributions of the parties." (citing Brown v. Brown, 574 So. 2d 688, 690 (Miss. 1990)).

258. *Ferguson*, 639 So. 2d at 925 (defining marital assets as "property accumulated through the joint contributions and efforts of the parties"); *id.* at 928 (listing equitable distribution factors); *id.* at 929 ("[F]airness is the prevailing guideline in marital division.").

259. *Cf.* Watts v. Watts, 405 N.W.2d 303, 311 (Wis. 1987) ("Courts have traditionally developed principles of contract and property law through the case-by-case method of the common law. While ultimately the legislature may resolve the problems raised by unmarried cohabiting parties, we are not persuaded that the court should refrain from resolving such disputes until the legislature gives us direction.").

260. *Cf.* Stolzenberg, *Properties of Intimacy*, *supra* note 17, at 685 (proposing "an equitable, asset-restricted cause of action for recovery of some property acquired during the relationship but titled in the other partner's name").

261. *Id.* at 686; *id.* at 686–89 (discussing under what circumstances particular assets might qualify for inclusion); *id.* at 689–90 (discussing possible factors).

262. *Cf.* UNIF. COHABITANTS' ECON. REMEDIES ACT § 7(a) (UNIF. L. COMM'N 2021) ("[A] cohabitant may commence an equitable action against the other cohabitant concerning entitlement to property *based on contributions to the relationship*." (emphasis added)).

which to address collective concerns about redressing harm, encouraging and protecting trust, and preventing exploitation between unmarried partners.[263]

B. *Other Private Law Disputes Between Intimates*

Because cooperation takes many forms, cohabitants are not the only disputants whose relations pose difficulty for private law governance. Other parties, including family members, friends, close associates, and some parties in relations of trust, may also interact in ways that simpler behavioral models and concomitantly streamlined doctrine do not appropriately capture. When this kind of mismatch occurs, the resolution of these intimates' private law disputes may also fail to further the purposes of private law.[264]

Just as the structural deficiencies identified above pose problems beyond the law of voluntary obligations, this Article's account of cooperation offers insights for other fields of private law. Such areas might include, for example, the governance of shared resources through property's doctrine of waste and rules of contemporaneous co-ownership; cooperative endeavors like family- and friend-owned businesses; and relationships of trust, such as fiduciary law's "confidential relationships" and "sole interest" rules. In these domains, too, instantiating the empirical assumption that individuals might cooperate and the normative judgment that doing so is good might require rules of fair play different from those appropriate for more arm's-length parties.

1. Property Law

Rules governing contemporaneously co-owned property and the law of waste all mediate between owners with stakes in the same asset.[265] Being tied together through dependence on the same resource is a form of intimacy.[266] For this reason, applying the lens of cooperation, with its imperative to fairly distribute the benefits and burdens of ownership, can help to justify existing doctrine or to suggest possible reform. Consider, for example, the majority view that the co-tenant in possession of the whole does not owe other co-tenants rent unless they've been ousted.[267] A fair distribution of benefits and burdens might require some compensation to co-tenants not in possession, at least to

263. *See supra* notes 32–38, 222 and accompanying text; *cf.* UNIF. COHABITANTS' ECON. REMEDIES ACT § 7 cmt. (UNIF. L. COMM'N 2021) ("Reasonable reliance may give rise to an equitable claim.").

264. *See supra* notes 32–36 and accompanying text.

265. *See* Michael C. Pollack & Lior Jacob Strahilevitz, *Property Law for the Ages*, 63 WM. & MARY L. REV. 561, 599 (2021) ("The law of waste shows how holders of successive interests in land can become as interdependent as contemporaneous co-owners.").

266. Stolzenberg, *Properties of Intimacy*, *supra* note 17, at 667–69.

267. *See, e.g.*, Spiller v. Mackereth, 334 So. 2d 859, 861–62 (Ala. 1976).

those who actively wish to use the property. Or it might require some mediation process to attempt to reconcile co-tenants' proposed uses.[268]

Cooperation might also provide a parallel justification for the law of waste, whose "central idea" has been described as "A should not be able to use the property in a manner that *unreasonably* interferes with the expectations of B."[269] The expectation of fairly distributing benefits and burdens from a shared resource could provide an explicit logic for determining what kinds of uses are "reasonable."[270] This expectation could also impose some limits on the extent to which even permissible uses are allowed to intrude on the interests of non-using co-owners.

2. Business Associations Law

As contract law confronts intimacy in the context of cohabitants, so too does corporate law in the context of closely held corporations.[271] These enterprises—"typified by a small number of stockholders, the absence of a market for its stock, and substantial shareholder participation in the management of the corporation"—are often co-owned by family members or friends,[272] meaning that shareholders' interactions may reflect their deep social relationships more than the law-and-economics rational actor behavioral model.[273] Understanding intimates' business co-ownership as representing a thicker form of cooperation justifies the existence of protections from corporate oppression for minority

268. *Cf.* Rishi Batra, *Improving the Uniform Partition of Heirs Property Act*, 24 GEO. MASON L. REV. 743, 763–64 (2017) (proposing mandatory mediation of family disputes that give rise to partition actions).

269. JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY 280 (9th ed. 2018).

270. *See* Pollack & Strahilevitz, *supra* note 265, at 595–99 (discussing and critiquing courts' attempts to mediate between interests of life tenants and remaindermen).

271. Indeed, some corporations scholars "view corporate law as simply a modest extension of contract law." John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1619 (1989).

272. Allison Anna Tait, *Corporate Family Law*, 112 NW. U. L. REV. 1, 2 n.1 (2017); *see also* Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 FORDHAM L. REV. 1161, 1163 (2010) ("[F]ounding a business is an inherently hopeful act, and fellow investors are often family members or friends."); *cf.* ETHAN J. LEIB, FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW HAS TO DO WITH IT 156–57 (2011) ("[V]ery often business relationships are forged on the backs of friendships, where it is not easy to disentangle what is motivated by the commercial part of the relationship and what is by the friendship part . . . not only for outside observers but for the parties as well.").

273. Means, *supra* note 272, at 1165–66 ("[C]lose corporation shareholders . . . systematically fail to do what the rational actor theory predicts."); Tait, *supra* note 272, at 4 (arguing that rules "grounded in the expectation that parties will bargain efficiently and seek to maximize their own benefit . . . . do not make sense" as applied to closely owned corporations); *id.* ("Corporate family members are . . . enmeshed in a complex set of interlocking relationships that intertwine the personal with the professional.").

shareholders of close corporations.[274] It may also suggest doctrinal reforms to better safeguard the interests of intimate shareholders who, due to their social relations and their enterprises' organization, lack meaningful exit options.[275]

3. Fiduciary Law

Fiduciary law imposes special duties on parties in relations of trust to protect against the vulnerabilities that arise from the relationship. Although some fiduciary relationships are established as a matter of law, others—sometimes called "confidential relationships"—must be proven as a matter of fact in a given case.[276] Astonishingly, many jurisdictions do not consider spouses to be one another's fiduciaries as a matter of law,[277] despite the fact that marital cooperation can render a spouse extremely vulnerable to the other's opportunism or exploitation. Taking intimacy seriously requires treating spouses as fiduciaries as a matter of law in at least some contexts.[278] Similarly, at least some unmarried partners and friends should also be subject to fiduciary duties in their property- and business-related dealings.[279]

This Article's account of intimate cooperation also informs the application of fiduciary law's core duty, the duty of loyalty. This duty obligates the fiduciary to "use her powers not for her own benefit but for the exclusive benefit of her beneficiary."[280] But this "sole interest" rule can be a poor fit when family members or even friends are serving in a fiduciary role.[281] Because the cooperation

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274. Means, *supra* note 272, at 1163 (rejecting the law-and-economics "objection to shareholder oppression doctrine" as "bear[ing] at most an approximate relation to reality").

275. *Cf., e.g.*, Tait, *supra* note 272, at 48–61 (drawing from divorce and inheritance law to propose reforms to better protect minority shareholders of family-owned closely held corporations).

276. LEIB, *supra* note 272, at 111–12.

277. *See* Stolzenberg, *Properties of Intimacy*, *supra* note 17, at 680 n.313.

278. *See id.* at 680–81 (discussing management of marital or community property); *see also, e.g.*, CAL. FAM. CODE § 721(b) (2020) ("[I]n transactions between themselves, spouses are subject to . . . . a duty of the highest good faith and fair dealing . . . and neither shall take any unfair advantage of the other.").

279. *See* LEIB, *supra* note 272, at 111 (arguing that "we should accept close friendship as triggering certain fiduciary duties").

280. Lynn A. Stout, *On the Export of U.S.-Style Corporate Fiduciary Duties to Other Cultures: Can a Transplant Take?*, *in* GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNANCE IN A NEW ERA OF CROSS-BORDER DEALS 46, 55 (Curtis J. Milhaupt ed., 2003); *id.* ("It is . . . proscribed . . . for a fiduciary to extract a personal benefit from her fiduciary position without her beneficiary's consent, even when she can do this without harming the beneficiary."); *see also* RESTATEMENT (THIRD) OF TRS. § 78(1) (AM. L. INST. 2007) (describing trustee's "duty to administer the trust solely in the interest of the beneficiaries"); UNIF. TR. CODE § 802(a) (UNIF. L. COMM'N 2000) ("A trustee shall administer the trust solely in the interests of the beneficiaries."). *See generally* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929 (2005) (describing the "sole interest" rule and advocating its replacement with a "best interest" rule).

281. *See* Ben Chen, *Family Fiduciaries in the Protective Jurisdiction*, 44 MELB. U. L. REV. 55, 57 (2020) (arguing that, in the case of individuals serving as guardians or attorneys for incapacitated family members, fiduciary law should be relaxed to accommodate "harmless" conflicts).

paradigm normalizes more complex understandings of how individual and joint benefits may accrue in relationships, it can shed light on factual scenarios in which departing from the sole interest rule can serve, rather than undermine, beneficiaries' interests.

C. Enriching Private Law Theory

The cohabitant cases reveal gaps in private law theory as well as doctrine. For this reason, revised and expanded private law theories will be required to remedy the doctrinal lacunae identified in this Article. Fortunately, the project of articulating a law of intimate obligations is a generative one, yielding potential payoffs for private law theory.

Private law has thus far approached intimates' property disputes mainly through the lens of promoting private ordering, but this orientation has been insufficiently attentive to society's interests in close relationships.[282] To accurately describe and effectively protect *all* kinds of cooperation, scholars of private law need to develop theories that both take account of intimacy and accept some role for collective concerns.[283] Both propositions are contested in current scholarship, as many private law theorists offer incompatible accounts of the nature of private law actors and actively debate private law's proper relation to public values.

Some theorists take an intrinsic approach, insisting that private law has its own distinctive purposes and logic separate from the public values that other political institutions are charged with furthering.[284] Under these theories, private law is "a system of negative duties of non-interference with the rights of others,"[285] existing to realize freedom and formal equality between "abstract" and "dissociated person[s]."[286] Because this approach understands freedom as "independence" to pursue one's own purposes, promoting public values through private law compromises individuals' formal equality and is illegitimate.[287]

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282. *See supra* Sections II.B–.C; *see, e.g.*, Mason v. Rostad, 476 A.2d 662, 666 (D.C. 1984) (describing "the position that the courts will not participate in resolving" cohabitant "disputes in accordance with general principles of law and, thus, will leave the parties to their own devices" as "unrealistic and unresponsive to social need").

283. *Cf.* D'Onfro, *supra* note 223, at 1396 ("The range of disputes to which the private law could provide a remedy are as richly varied as the relationships that give rise to those disputes.").

284. *See generally* PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW (2019); RIPSTEIN, *supra* note 30; WEINRIB, *supra* note 30. As these citations suggest, the position is closely associated with the Kantian theories of the Toronto School of private law. DAGAN & DORFMAN, *supra* note 18, at 27.

285. ERNEST J. WEINRIB, CORRECTIVE JUSTICE 11 (Timothy Endcott, John Gardner & Leslie Green eds., 2012).

286. DAGAN & DORFMAN, *supra* note 18, at 27 (emphasis omitted).

287. *See* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 14–45 (2009).

Other theorists take an instrumentalist approach to private law. Welfarist approaches, synonymous with economic analyses of law, "treat[] [private] law as a technology for allocating resources and entitlements so as to maximize overall welfare."[288] Under these accounts, private law governs rational, self-interested actors seeking to maximize satisfaction of their preferences.[289] Egalitarian approaches, on the other hand, treat individuals as "citizens of a polity" who "bear direct responsibility for realizing the demands of justice" not only through their political institutions, but also through their bilateral social relations.[290] Both approaches take private law to be just another tool through which society pursues public values—optimizing social welfare for welfarists, distributive justice for egalitarians—meaning that private law's attention to the structure of relations between individuals is only a contingent, rather than a necessary, feature.

Neither intrinsic nor instrumentalist theories provide adequate frameworks for governing intimate cooperation. Consider first the various theories' treatment of intimacy. Because intrinsic approaches are concerned with only formal equality and deem the "particular features . . . that might distinguish one agent from another" irrelevant to private law,[291] they exclude the very considerations that a focus on intimacy brings to the fore: the socially embedded context of all human interactions. Instrumentalist approaches fare little better. The welfarist rational-actor model is an especially bad fit for intimates' behavior,[292] and egalitarian accounts of legal agents as citizens may not speak to the closest social relationships, which are characterized by affective particularity.[293] Nor are the theories' orientations toward public values conducive to governing intimates' obligations. On the one hand, intrinsic theories would resist the importation of public concerns such as substantive fairness into private law. On the other hand, instrumentalist theories' goal of creating beneficial social patterns renders them indifferent to what precise obligations obtain between

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288. DAGAN & DORFMAN, *supra* note 18, at 60.

289. *See, e.g.*, Scott, *supra* note 213, at 24 ("The purpose of contract law is to enforce the parties' intent, and most parties intend to maximize the joint value of their contracts at the time they form them." (emphasis omitted)).

290. DAGAN & DORFMAN, *supra* note 18, at 31; *see, e.g.*, ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 95 (2010) (arguing that democracy requires "the free interaction of citizens from all walks of life on terms of equality and mutual regard in all institutions of civil society, and on voluntary terms in the intimate associations of private life").

291. WEINRIB, *supra* note 30, at 82.

292. *See supra* Section III.C.

293. *See, e.g.*, ANDERSON, *supra* note 290, at 20 (tolerating "individuals acting out of warm feelings for in-group members in the context of personal relations of friendship and intimacy" because "[o]ut-group members are not morally entitled to demand that these individuals befriend them," but characterizing "such conduct" as "contain[ing] the seeds of injustice since it may spread its effects beyond the sphere of intimate relations"); LEIB, *supra* note 272, at 21 (arguing that friendship "requires partiality" and a degree of exclusivity).

particular sets of actors, abdicating the vital private law task of governing relationships.

Developing a law of intimate obligations will require decision-makers to articulate and to apply more publicly inflected judgments about how intimate relationships should proceed. Under a private law theory that takes relationships seriously, it is appropriate for private law to embrace such judgments and to impose obligations accordingly. This means that the law of voluntary obligations should define voluntariness less stringently in at least some cases, as relating to an actor's mental state in engaging in a course of conduct (undertaking cooperation), rather than in willing some particular obligation into being (narrow contractual consent). The question thus becomes not *whether* the law should make recourse to public values and norms, but rather *which* values and norms should guide judges' decisions when intimate cooperation breaks down. I have argued that courts should seek to fairly distribute the benefits and burdens of cooperation, but others may disagree, and even if this goal is adopted, it must be translated into legal doctrine. Openly acknowledging the public's interests in private ordering would permit scholars, courts, and legislatures to explicitly debate what shape voluntary obligations should take. And once the public dimensions of private ordering are normalized in the context of intimates, private law doctrine may be more open to incorporating publicly inflected concerns in more arm's-length contexts as well.[294] Finally, a law of voluntary obligations that is attentive to public interests would be better aligned with torts and equity, which freely own the collective's role in shaping the content of private law rights and duties.

Considering intimates' obligations also lays the groundwork for a richer, more nuanced body of private law doctrine and theory. Constructing private law doctrine around strangers' interactions entrenches and perpetuates the law's oversimplification of human relations and responsibilities, yielding flatter, less authentic private law theories.[295] If the ambition of private law theorists is to fully and accurately describe "the law of interpersonal relationships,"[296] they must join feminist and family scholars in wrestling with the challenges of achieving interpersonal justice in the most complicated cases: disputes between intimates.

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294. *Cf., e.g.*, Sabine Tsuruda, *Race, Unconscionability, and Contractual Equality*, 60 HARV. C.R.-C.L. L. REV. 159, 164 (2025) (arguing for an "approach to unconscionability" that "would ask whether contract enforcement is consistent with treating the parties as equals . . . with respect to their basic interests and inalienable rights").

295. *See* DAGAN & DORFMAN, *supra* note 18, at 3–6; *see also* Goldberg, *supra* note 28, at 1640 ("Private law defines the rights and duties of individuals and private entities as they relate to one another.").

296. DAGAN & DORFMAN, *supra* note 18, at 3; *see also* Goldberg, *supra* note 28, at 1640 ("Private law defines the rights and duties of individuals and private entities as they relate to one another.").

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When intimates' cooperation is pushed to the periphery of the law of voluntary obligations, it's easy to view such obligations as arising only between individuals acting at arm's length[297]—and therefore to assess those obligations largely in terms of their effects on the persons directly involved. But when we take intimates as our central case, society's interest in how private law constructs bilateral obligations comes sharply into focus. As the problem of intimates' voluntary obligations makes clear, even when private law seeks to facilitate individual autonomy through property and contract, it must also articulate and enforce collectively defined norms. Recognizing that even private-ordering-focused areas of private law have important public dimensions would make for a more normatively attractive private law, and not just for intimates as colloquially defined. Moreover, acknowledging that *all* private law obligations implicate collective concerns would allow us to better focus our theoretical energies on assessing *how* and *which* public interests private law should express.

CONCLUSION

For the past century and a half, the law of voluntary obligations has generally approached intimates' disputes by identifying what these relations are *not*: not "impersonal," not "discrete," not purely self-interested, and therefore not the subject of the law's concern.[298] Going forward, private law's task must be to define what intimate relations *are*: the locus of a different kind of cooperation, just as socially valuable as market-focused cooperation and just as in need of governance by legal rules tailored to address its own predictable forms of risk. The project of protecting *all* kinds of cooperation raises the same underlying questions of duties and rights, harms and benefits—and the same tension between autonomy and community—that characterize all bilateral legal relations.[299] Seriously grappling with what individuals owe one another in their

297. *Cf.* Kronman, *supra* note 158, at 797 ("When the promisor is treated . . . as a disembodied ego or will without personal qualities, it is easy to forget that even the most impersonal market transaction occurs between human beings with a natural history . . . . The will-based theories of obligation that dominate the intellectual scene today obscure the complexity of our law of contracts by putting before us a wholly denatured conception of the person in which passion and moral imagination have no place." (footnote omitted)).

298. *Id.*; Ellman, *supra* note 21, at 1374 ("[C]ontractual obligations are well-defined in both time and nature, while the reciprocities expected in close social relationships are not."). *See generally, e.g.*, Halley, *supra* note 110 (tracing the development of and critiquing "family law exceptionalism"); *id.* at 3 (defining "family law exceptionalism" as "the construction of the legal order to render the family and its law distinctive, special, other, exceptional").

299. *See, e.g.*, WEINRIB, *supra* note 30, at 10 ("[P]rivate law embodies a regime of correlative rights and duties that highlights, among other things, the centrality of the causation of harm and of the distinction between misfeasance and nonfeasance."); Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1446 (2016) (noting "the significant impact of human interdependence on self-determination").

closest relationships can only enrich our understandings of other relations more historically the focus of private law.